280 N.C. App.—No. 1 Pages 1-130

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 27, 2022

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COURT OF APPEALS

CASES REPORTED

FILED 19 OCTOBER 2021

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appellate Rule 2—exceptional circumstances—trial court's comments regarding race and religion—The Court of Appeals invoked Appellate Rule 2 to consider the merits of defendant's argument that the trial court's comments regarding race and religion during jury selection deprived him of a fair trial, where defendant did not object at trial, the issue was not preserved as a matter of law, and the case presented exceptional circumstances justifying the use of Rule 2. **State v. Campbell, 83.**

Preservation of issues—jury instructions—different objection asserted on appeal—reviewed for plain error—Where defendant asserted a different ground on appeal for the objection he lodged at the trial court for its jury instruction on constructive possession (in a trial for possession of a firearm by a felon and other offenses), he failed to preserve his argument for appeal. However, since he clearly contended the instruction amounted to plain error, he was entitled to plain error review. **State v. Neal, 101.**

Preservation of issues—jury instructions—no objection—reviewed for plain error—Defendant's challenge to the trial court's jury instruction on attempted first-degree murder did not constitute invited error where, although defendant requested an instruction, the trial court made an alteration before relating it to the jury, but

APPEAL AND ERROR—Continued

defendant's failure to object to the instruction as given did not preserve the issue for appellate review. However, since he clearly contended the instruction amounted to plain error, he was entitled to plain error review. **State v. Neal, 101.**

Waiver of constitutional issue—right to parent—notice and opportunity to be heard—Where a mother in an abuse, neglect, and dependency matter was on notice that guardianship with a third party was recommended for her three children and would be considered at the dispositional hearing, she waived any argument on appeal that her constitutional right to parent was violated by failing to raise that issue when she had the opportunity. **In re W.C.T., 17.**

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Jury instructions—constructive possession—possession of firearm by felon—pattern instruction used—In a trial for possession of a firearm by a felon and other offenses, the trial court did not err, much less plainly err, when it instructed the jury on constructive possession during the introductory general instructions or when it instructed the jury on the specific elements of possession of a firearm by a felon. The court followed the pattern jury instructions and gave an accurate statement of the law. **State v. Neal, 101.**

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duty to serve as jurors. The trial court's comments could have negatively influenced the jury selection process, including by discouraging other potential jurors from responding honestly to questions regarding their ability to be fair and honest, thereby denying defendant a fair trial. **State v. Campbell, 83.**

EASEMENTS

Bodies of water—flowage—permits to third parties—Where, decades ago, a married couple granted Duke Power Company (Duke) two easements—a flowage easement and a flood easement—over their property for Duke's project of flooding lands adjacent to the Catawba River to create Lake Norman, leaving the couple with some lakebed property and an unsubmerged island, which they subdivided and sold much of to third parties, Duke lacked authority under the flowage easement to permit the third parties (who were strangers to the easement agreement) to build and maintain docks and other structures over and into the submerged land retained by the married couple's heirs. **Duke Energy Carolinas, LLC v. Kiser, 1.**

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REAL PROPERTY

Sale of home on behalf of incompetent woman—validity of multiple powers of attorney—genuine issues of material fact—In an action brought on behalf of an elderly woman to contest the sale of her home by her daughter, the trial court erred by granting summary judgment in favor of the home's buyer and in cancelling plaintiffs' notice of lis pendens, where genuine issues of material fact existed regarding the validity and scope of powers of attorney (POAs) purportedly held by the daughter and by one of the woman's sons, including whether either POA was durable, and whether any of the parties had authority to act on behalf of the woman after she was declared partially incompetent in a special proceeding before a clerk of court. **Leary v. Anderson, 46.**

N.C. COURT OF APPEALS
2022 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	10 and 24
February	7 and 21
March	7 and 21
April	4 and 25
May	9 and 23
June	6
August	8 and 22
September	5 and 19
October	3, 17, and 31
November	14 and 28
December	None (unless needed)

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DUKE ENERGY CAROLINAS, LLC, PLAINTIFF
v.
MICHAEL L. KISER, ROBIN S. KISER, AND SUNSET KEYS, LLC,
DEFENDANTS/THIRD-PARTY PLAINTIFFS
v.
THOMAS E. SCHMITT AND KAREN A. SCHMITT, ET AL., THIRD-PARTY DEFENDANTS

No. COA20-333

Filed 19 October 2021

1. Easements—bodies of water—flowage—permits to third parties

Where, decades ago, a married couple granted Duke Power Company (Duke) two easements—a flowage easement and a flood easement—over their property for Duke's project of flooding lands adjacent to the Catawba River to create Lake Norman, leaving the couple with some lakebed property and an unsubmerged island, which they subdivided and sold much of to third parties, Duke lacked authority under the flowage easement to permit the third parties (who were strangers to the easement agreement) to build and maintain docks and other structures over and into the submerged land retained by the married couple's heirs.

2. Waters and Adjoining Lands—Federal Energy Regulatory Commission license—easements—permits to third parties for docks

Where, decades ago, a married couple granted Duke Power Company (Duke) two easements—a flowage easement and a flood easement—over their property for Duke's project of flooding lands adjacent to the Catawba River to create Lake Norman, leaving the couple with some lakebed property and an unsubmerged island,

which they subdivided and sold much of to third parties, Duke's Federal Energy Regulatory Commission license did not give Duke the authority to permit the third parties (who were strangers to the easement agreement) to build and maintain docks and other structures over and into the submerged land retained by the married couple's heirs.

3. Waters and Adjoining Lands—navigability—public trust doctrine and riparian rights—man-made lake—questions of fact

In a dispute over permits granted by a power company for docks to be built into a man-made lake (Lake Norman), where the parties raised the issues of the public trust doctrine and riparian rights for the first time on appeal, the appellate court declined to consider the merits of these new arguments, because they largely involved questions of fact regarding navigability for a fact-finder to determine.

Appeal by Defendants from orders and judgments entered 27 August 2018 and 2 January 2020 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 24 February 2021.

Redding Jones, PLLC, by Ty K. McTier and David G. Redding, for Defendants-Appellants.

Troutman Sanders LLP, by Kiran H. Mehta and Victoria A. Alvarez, for Plaintiff-Appellee.

Jones, Childers, Donaldson & Webb, PLLC, by Mark L. Childers, Kevin C. Donaldson, and C. Marshall Horsman, III, for Third-Party Defendants-Appellees.

David P. Parker, PLLC, by David P. Parker, for Thomas E. Schmitt, Karen A. Schmitt, Linda Gail Combs, and Robert Donald Shepard, Third-Party Defendant-Appellees.

WOOD, Judge.

¶ 1 This case concerns the rights of third-party landowners to build and maintain docks and other structures over and into the submerged land belonging to another, such land comprising a portion of the lakebed, subject to the easement of a power company. For reasons outlined below, we reverse and remand.

I. Factual and Procedural Background

¶ 2 From 1946 to 1960, before the construction of Lake Norman, B. L. and Zula Kiser (the "Kiser Grandparents") acquired the land at issue in fee simple. In 1960, much of the bed of Lake Norman was dry. By 1961, Duke Power Company ("Duke")[1] intended to flood lands adjacent to the Catawba River, the river that now feeds Lake Norman, with the construction of the Cowan's Ford Dam. Duke obtained titles and easement rights to those lands that are now submerged under Lake Norman pursuant to the requirements of a Federal Energy Regulatory Commission ("FERC") license. The majority of the owners of the now submerged land sold their property in fee to Duke, while the Kiser Grandparents chose to grant only easements to Duke. The Kiser Grandparents granted Duke the following easements:

> [A] permanent easement of water flowage, absolute water rights, and easement to back, to pond, to reaise [sic], to flood and to divert the waters of the Catawba River and its tributaries in, over, upon, through and away from the 280.4 acres, more or less, of land hereinafter described, together with the right to clear, and keep clear from said 280.4 acres, all timber, underbrush, vegetation, buildings and other structures or objects, and to grade and to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable by Duke Power Company.
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> . . . .
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> And . . . a permanent flood easement, and the right, privilege and easement of backing, ponding, raising, flooding, or diverting the waters of the Catawba River and its tributaries, in, over, upon, through, or away from the land hereinafter described up to an elevation of 770 feet above mean sea level, U.S.G.S. datum, whenever and to whatever extent deemed necessary or desirable by the Power Company in connection with, as a part, of, or incident to the construction, operation, maintenance, repair, altering, or replacing of a dam and hydroelectric power plant

1. In the present case, Duke Energy Carolinas, LLC is the controlling subsidiary of Duke Energy Corporation (previously Duke Power Company) and is likewise referenced as "Duke."

> to be constructed at or near Cowan's Ford on the Catawba River . . . . [2]

¶ 3 The first easement (the "Flowage Easement") references 280.4 acres of land by metes and bounds, which topographically rested below an "elevation 760 feet above mean sea level," and which would become part of the bed of Lake Norman. The second easement (the "Flood Easement") references land by metes and bounds which topographically rested between 760 feet and "770 feet above mean sea level," that would remain dry land, but subject to flooding, after the creation of Lake Norman. The Kiser Grandparents and their successors made no further grants or conveyances of the land to Duke.

¶ 4 In 1963, Duke flooded the lands that today comprise Lake Norman. Of those lands not submerged, the Kiser Grandparents retained an area of land that became an island (the "Kiser Island"). The Kiser Grandparents subsequently subdivided the Kiser Island into residential waterfront lots and conveyed title in fee simple to most of those lots to various buyers (the "Third Parties") between 1964 and 2015. The Kiser Grandparents retained at least one lot (the "Kiser Lot") for their continued personal use.

¶ 5 Consistent with its license from the FERC to dam the Catawba River, Duke instituted a project plan that outlined requirements and a permitting process for the construction of shoreline improvements into the waters of Lake Norman. Relying upon Duke's permitting process, many of the Third Parties on Kiser Island proceeded to construct docks and other structures that extended from the dry land of their lots over and into the waters of Lake Norman, and "that are anchored to or at least touch in some way . . . the submerged tract, the Kiser property that's beneath Lake Norman." Some of these structures were built prior to when Duke's permitting process began and were memorialized as existing when the procedure commenced.

¶ 6 In 2015, M. L. Kiser ("M.L."), a grandson of the Kiser Grandparents, erected a retaining wall (the "2015 wall") approximately seventeen and a half feet from the Kiser Lot into Lake Norman and upon the 280.4 acres to which Duke has an easement. M.L. began backfilling the wall to add additional dry surface area to the Kiser Lot, which extended his shoreline. Unlike the Third Parties, M.L. did not originally apply for a permit from Duke to construct the 2015 wall; though, the new construction did encompass land previously submerged and subject to Duke's Flowage Easement.

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2. For purposes of review, the language of the easement here reflects a filed copy that immaterially differs from the original through spelling and grammatical differences.

¶ 7 In response to this construction, Duke issued a Stop-Work Directive, and the North Carolina Division of Water Resources notified M.L. that the construction of the wall would impact the waters of Lake Norman. A survey conducted on the Kisers' property by a licensed professional land surveyor in August 2016 revealed that "the total area of the retaining wall and backfill within Lake Norman is approximately 2,449 square feet."

¶ 8 After the death of M.L.'s father in March 2016, he and his two brothers became the owners of the land at issue. That land was then conveyed to Sunset Keys, LLC ("Sunset Keys"), of which M.L. and his two brothers are the members.

¶ 9 On January 27, 2017, Duke commenced this action against M. L. Kiser, his wife, Robin S. Kiser, and, later, Sunset Keys, LLC ("the Kisers") alleging trespass and wrongful interference with an easement and requested injunctive relief. The Kisers responded with counterclaims against Duke, challenging Duke's authority under the easements to demand removal of the 2015 wall, to issue permits to the Third Parties for the construction of docks on their lots, and to open the waters above those lots to recreational use. The Kisers subsequently moved to join the Third Parties as defendants on February 13, 2017.

¶ 10 Duke moved for partial summary judgment regarding its claim for injunctive relief on August 13, 2018. The trial court entered an order and judgment granting partial summary judgment on August 22, 2018 (the "2018 Order"), to have the 2015 retaining wall and the backfilled area cleared.[3] Duke and the Third Parties then moved for summary judgment denying all of the Kisers' counterclaims and allowing Duke's remaining trespass claim on October 24, 2019, and October 25, 2019, respectively. On November 15, 2019, the trial court entered an order and judgment enforcing the 2018 Order.

¶ 11 On January 2, 2020, the trial court entered an order and judgment (the "2020 Order) granting summary judgment in favor of Duke and the Third Parties by quieting title in the lots, improvements, and use of the waters to the Third Parties. The trial court ruled Duke had operated within its "Scope of Authority" when it granted permission for the Third Parties to construct improvements over and into the Kiser's submerged land. The trial court stated, "[T]his Order and Declaratory Judgment does not dispose of all the claims in this action." The Kisers filed and served a notice of appeal for the 2020 Order on January 24, 2020, and

3. For reasons stated below, the 2018 Order to remove the wall and fill material is not reviewed here.

later filed and served a notice of appeal for the 2018 Order on February 3, 2020. While the 2020 Order was certified for review pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), the 2018 Order was not.

II. Discussion

¶ 12 We review a trial court's summary judgment order *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted). We cannot affirm a trial court's summary judgment order if a "genuine issue as to any material fact" remains when viewed in the light most favorable to the non-moving party. *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385 (quoting N.C. R. Civ. P. 56(c)). When reviewing a summary judgment order, "we view the evidence in the light most favorable to the non-movant." *Scott & Jones, Inc. v. Carlston Ins. Agency, Inc.*, 196 N.C. App. 290, 293, 677 S.E.2d 848, 850 (2009) (quoting *Baum v. John R. Poore Builder, Inc.*, 183 N.C. App. 75, 80, 643 S.E.2d 607, 610 (2007) (citation omitted)).

¶ 13 Because not all issues are disposed of in this case, we review this case as an interlocutory appeal. *See Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015). The parties correctly note that a non-certified, interlocutory judgment is not ripe for review when the appellant does not raise the issue in the appellant's principal brief. *Id.* at 79, 772 S.E.2d at 96. This being true of the 2018 Order, we decline to review the 2018 Order and limit our review and analysis to the 2020 Order.

A. Third Party Activity upon Easement

¶ 14 The Kisers first contend Duke did not act within its scope of authority when it permitted the use of the 280.4 acres to the Third Parties without the Kisers' consent and the trial court ultimately erred in quieting title of the lakefront structures to the Third Parties. We agree.

¶ 15 A "cloud upon title" arises when there is a claim or encumbrance that affects the ownership of a property. *See York v. Newman*, 2 N.C. App. 484, 488, 163 S.E.2d 282, 285 (1968) ("A cloud upon title is, in itself, a title or encumbrance, apparently valid, but [is] in fact invalid. It is something which, nothing else being shown, constitutes an encumbrance upon it or a defect in it." (citation omitted)). The elements have been defined by this Court as "(1) the plaintiff must own the land in controversy, . . . and (2) the defendant must assert some claim in the land adverse to plaintiff's

title, estate, or interest." *Greene v. Trustee Servs. of Carolina, LLC*, 244 N.C. App. 583, 592, 781 S.E.2d 664, 671 (2016) (citations omitted); *see also York*, 2 N.C. App. at 488, 163 S.E.2d at 285; *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004).

¶ 16 The elements of a "cloud on title" action are the same as those for a "quiet title" claim. *See Greene*, 244 N.C. App. at 591-92, 781 S.E.2d at 670-71; *see also Quinn v. Quinn*, 243 N.C. App. 374, 380, 777 S.E.2d 121, 125 (2015) (citation omitted). The purpose of a quiet title or cloud upon title action is to "free the land of the cloud resting upon it and make its title clear and indisputable." *Resort Dev. Co. v. Phillips*, 278 N.C. 69, 77, 178 S.E.2d 813, 818 (1971) (citation omitted). Here, the land at issue is owned by the Kisers and subject to easements granted to Duke by the Kiser Grandparents. The Third Parties are not parties to the easement.

¶ 17 "An easement is an incorporeal hereditament, and is an interest in the servient estate. . . . 'A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.' " *Davis v. Robinson*, 189 N.C. 589, 597-98, 127 S.E. 697, 702 (1925) (citations omitted). More simply, an "easement is a privilege, service, or convenience which one neighbor has of another." *Id.*

¶ 18 Beginning with the nature of easements generally, "[a]n easement deed, such as the one in the case at bar, is, of course, a contract." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). "A contract which is plain and unambiguous on its face will be interpreted as a matter of law by the court." *Simmons v. Waddell*, 241 N.C. App. 512, 520, 775 S.E.2d 661, 671 (2015) (quoting *Dept. of Transportation v. Idol*, 114 N.C. App. 98, 100, 440 S.E.2d 863, 864 (1994)).

¶ 19 The interpretation of ambiguous contracts, by contrast, "is for the jury." *Cleland v. Children's Home, Inc.*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983). Ambiguity exists where the contract may be "fairly and reasonably susceptible to either of the constructions asserted by the parties." *St. Paul Fire & Marine Ins. Co. v. Freeman-White Associates, Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988) (quoting *Maddox v. Insurance Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981) (citation omitted)). Though a dispute as to contractual interpretation may lend credence to its ambiguity, id. (citation omitted), "ambiguity is not established by the mere fact that one party makes a claim based upon a construction of its language which the other party asserts is not its meaning." *RME Mgmt., LLC v. Chapel H.O.M. Assocs., LLC*, 251 N.C.

App. 562, 568, 795 S.E.2d 641, 645 (2017) (alterations omitted) (quoting *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)).

¶ 20 "Whenever a court is called upon to interpret a contract[,] its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973) (citation omitted). In doing so, "[i]t must be presumed the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citations omitted).

¶ 21 Easements may either be appurtenant or in gross. *Davis*, 189 N.C. at 598, 127 S.E. at 702. While an appurtenant easement "attaches to, passes with[,] and is an incident of ownership of the particular land" referred to as the dominant tenement, *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992), an easement in gross "is a mere personal interest in or right to use the land of another" that is not attached to any dominant tenement and "usually ends with the death of the grantee." *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963) (citation omitted). An easement appurtenant is an easement that benefits one parcel of land, the dominant tenement, to the detriment of another parcel of land, the servient tenement. *See Nelms v. Davis*, 179 N.C. App. 206, 209, 632 S.E.2d 823, 825-26 (2006) (citations omitted).

¶ 22 In determining whether an easement is appurtenant or in gross, we look to

> the nature of the right and the intention of the parties creating it, and [such] must be determined by the fair interpretation of the grant . . . creating the easement, aided if necessary by the situation of the property and the surrounding circumstances. If it appears from such a construction of the grant . . . that the parties intended to create a right in the nature of an easement in the property retained for the benefit of the property granted, . . . such right will be deemed an easement appurtenant and not in gross, regardless of the form in which such intention is expressed. On the other hand, if it appears from such a construction that the parties intended to create a right to be attached to the person to whom it was granted . . . , it will be deemed to be an easement in gross. An easement is appurtenant to land, if it is so in fact, although

> it is not declared to be so in the deed or instrument creating it; and an easement, which in its nature is appropriate and a useful adjunct of land owned by the grantee of the easement, will be declared an 'easement appurtenant,' and not 'in gross,' in the absence of a showing that the parties intended it to be a mere personal right. In case of doubt, an easement is presumed to be appurtenant, and not in gross.

Shingleton, 260 N.C. at 455, 133 S.E.2d at 186 (internal citations omitted).

¶ 23 We hold the language of the easement at issue is unambiguous on its face, and, though the parties dispute whether Duke may permit third-party activity upon the easement, such dispute solicits an examination of the rights of strangers to an agreement, which is properly a matter of law. While a deed should be considered in its entirety to ascertain the intent of the parties, the Flowage Easement encompasses the land at issue here, and it is the controlling easement.

¶ 24 As to the type of easements in this case, the deed conveying both easements does not indicate on its face whether the easements here are appurtenant or in gross. The record shows that Duke owns submerged land that is adjacent to—in fact, surrounding—the Kiser's submerged 280.4 acres of land. Because of Duke's adjacent land interests and the strong presumption in favor of interpreting easements as appurtenant, we hold that the easement *sub judice* constitutes an appurtenant easement. Here, the dominant tenement is owned by Duke, and the servient tenement is owned by the Kisers. The Third Parties are not parties to the easement.

1. Duke's Scope of Authority under the Easement

¶ 25 **[1]** Turning now to the matter at issue, we address whether Duke possesses authority under the Flowage Easement to permit the Third Parties to erect and maintain structures over and into the Kisers' submerged land. We look first to the document itself and note that the Flowage Easement is broad in its scope. In its most liberal reading, the Kiser Grandparents granted "Duke . . . absolute water rights . . . to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable." On its own, this language could easily be read to virtually convey a fee simple interest in the property; however, we decline to read the conveyance here in such a way.

¶ 26 The Kiser Grandparents, unlike some of their neighbors, clearly intended to retain title to the submerged 280.4 acres through the conveyance of an easement to Duke, rather than a conveyance in fee simple,

and effect must be given to this decision. Though property held in fee simple cannot be said to be "more sacred" than an easement, *Sweet v. Rechel*, 159 U.S. 380, 395, 16 S. Ct. 43, 47, 40 L. Ed. 188, 195 (1895), a fundamental difference exists between the nature of these two conveyances. We recognize the broad interest conveyed to Duke under the Flowage Easement in light of the nature of easements generally.

¶ 27 The question of whether an easement holder with virtually unlimited authority to "treat" property "in any manner" includes the power for the easement holder to permit strangers to the agreement to use the land for their own benefit has not been squarely addressed in this State. In *Lovin v. Crisp*, this Court addressed whether an easement holder could utilize water rights in his neighbor's springs to benefit other nearby landowners. 36 N.C. App. 185, 186, 243 S.E.2d 406, 407-08 (1978). Though the easement holder created an agreement with his neighbor to benefit the easement holder's land, the nearby landowners were not parties to the easement agreement. *Id.* at 186, 243 S.E.2d at 408. We concluded "that the deed created an easement appurtenant to the lands conveyed therein and to no others." *Id.* at 189, 243 S.E.2d at 409. While that case is not entirely analogous to the case *sub judice*, we nonetheless adopt the same principles in holding that, unless an easement explicitly states otherwise, an easement holder may not permit strangers to the easement agreement to make use of the land, other than for the use and benefit of the easement holder, without the consent of the landowner where such use would constitute additional burdens upon the servient tenement. *Id.*

¶ 28 This holding is consistent with the sensible principle outlined in the Restatement of Property: that "an appurtenant easement or profit may not be used for the benefit of property other than the dominant estate." Restatement (Third) of Prop.: Servitudes, § 4.11 (Am. L. Inst. 2000). Moreover, other states have adopted this rule. *See Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1238 (Colo. 1998) (holding that "an easement holder may not use the easement to benefit property other than the dominant estate." (citation omitted)); *Thornton v. Pandrea*, 161 Idaho 301, 310-11, 385 P.3d 856, 865 (2016) (holding consistent with § 4.11); *Reeves v. Godspeed Props.*, 426 P.3d 845, 850 (Alaska 2018) (quoting Restatement (Third) of Property: Servitudes § 4.11); *Wisconsin Ave. Props., Inc. v. First Church of the Nazarene*, 768 So. 2d 914, 917 (Miss. 2000) (noting that "by granting to one party an easement for its specific use, no rights are acquired by others not a party to the instrument creating the easement. This tenant is so fundamental that Mississippi has never needed to address the issue." (citation omitted)); *but see Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 551, 808 P.2d 1289, 1296

(1991) (holding that "a third party may obtain a license from an easement holder to use the easement without the notice to and consent from the servient estate owner so long as, and expressly provided that, the use of the easement is consistent with and does not unreasonably increase the burden to the servient estate").

¶ 29 Here, the Third Parties are not mentioned in either the Flowage Easement or elsewhere in the conveyance and are, thus, strangers to the easement agreement. The Third Parties had no property interest in the land at issue when the easement was created between the Kiser Grandparents and Duke. Therefore, absent other considerations, Duke exceeded its scope of authority by permitting the Third Parties to construct and maintain structures over and into the Kisers' submerged land without the Kisers' consent.

¶ 30 It may be argued Duke's deed of easement allows it to *assign* its easement rights to the Third Parties, rather than merely grant permissive use of the land at issue. However, this theory, too, fails. As in *Grimes v. Virginia Electric & Power Co.*, 245 N.C. 583, 96 S.E.2d 713 (1957), no easement right assignment was effectuated here. In *Grimes*, an individual conveyed an easement to a power company so that the company might maintain electric lines above the individual's property. *Grimes*, 245 N.C. at 583, 96 S.E.2d at 713. Later, the power company permitted the City of Washington to affix its own lines to the company's poles upon a theory of assignment. *Id.* at 584, 96 S.E.2d at 714. Our Supreme Court dispelled that theory, holding that the power company had not assigned anything and stating that "[t]wo power companies enjoy an easement over his land. He granted only one." *Id.* Likewise, no assignment of the easement has occurred or is present in this case. Here, Duke continues to exercise its rights under the easements and has not granted or conveyed to the Third Parties its rights under the easements. Duke has allowed the Third Parties to use the land subject to the easements in accordance with permits issued by Duke and without consent from the owner of the servient estate.

2. Duke's Scope of Authority under the FERC License

¶ 31 **[2]** Duke and the Third Parties assert that, regardless of Duke's authority under the easements, Duke maintains federally pre-empted authority to unilaterally permit third-party construction over and into the submerged 280.4 acres on account of Duke's license with the FERC. While we recognize that this license requires Duke to possess certain authority to manage and control shoreline development of Lake Norman, so as to maintain Duke's license and standing with the Commission, such

requirement does not, by itself, beget nor provide delegated authority to overburden or deprive others of their property. Indeed, as we held in *Zagaroli v. Pollock*, the requirements of a FERC license do "not abolish private proprietary rights." 94 N.C. App. 46, 54, 379 S.E.2d 653, 657 (1989) (citation omitted). *Zagaroli* is analogous here in that, though the easement in that case was much more limited than the Flowage Easement here, the defendants in that case asserted Duke's authority under its FERC license in a similar situation. This Court held that

> [a]lthough a FERC licensee may exercise the power of eminent domain over lands which will make up the bed of a lake associated with a hydroelectric dam, neither Duke Power nor its predecessor in title took the land in question by eminent domain. . . . [T]he Federal Power Act does not give Duke Power the authority to grant defendants the right to use plaintiff's property without the assent of the plaintiff. To hold otherwise would in effect authorize the taking of property without just compensation.

Id. at 54, 379 S.E.2d at 657-58 (internal citation omitted).

¶ 32 Put another way and as a court in another jurisdiction held,

> while the FERC license gives [the licensee] the *authority* to regulate certain uses and occupancies of land in the FERC Project Boundary without prior FERC approval, it does not give [the licensee] the *right* to do so. This is because [the licensee] must still have obtained independent control of land needed to operate and maintain [the] Project.

Tri-Dam v. Keller, No. 1:11–cv–1304–AWI–SAB, 2013 WL 2474692, at *3 (E.D. Cal. June 7, 2013) (unpublished).

¶ 33 The record here indicates that Duke had the authority and opportunity to seize in fee the property of the Kisers' predecessors through eminent domain but, instead, elected to negotiate an easement with the Kiser Grandparents. In so doing, Duke never acquired fee title to the submerged land and cannot now assert its authority under its FERC license as if it possessed the land in fee simple. As a result, Duke is limited to the uses and exercise of dominion over the Kiser Lake Parcel to those expressly granted in the easements. "[A]n easement holder may not increase his use so as to increase the servitude or increase the burden upon the servient tenement." *Hundley v. Michael*, 105 N.C. App. 432, 435, 413

S.E.2d 296, 298 (1992) (citation omitted). "If the easement holder makes an unwarranted use of the land in excess of the easement rights held, such [use] will constitute an excessive use . . . ." *Hundley*, 105 N.C. App. at 435, 413 S.E.2d at 298 (citing *Hales v. Atlantic Coast Line Railroad Co.*, 172 N.C. 104, 107, 90 S.E. 11, 12 (1916)).

¶ 34 The Federal Power Act does not give Duke Power more rights than those it acquired in the easements. Duke does not have the authority to grant the Third Parties the right to permit others to use the Kisers' property without the assent of the Kisers, because doing so would allow the taking of the Kisers' "property without just compensation." *Zagaroli*, 94 N.C. App. at 54, 379 S.E.2d at 658.

3. Duke's Inconsistent Permitting Policies

¶ 35 Next, the Kisers argue that Duke should not be allowed to prohibit the Kisers' maintenance of a structure within the 280.4 acre area, while simultaneously permitting the Third Parties' maintenance of structures within the same. The Kisers contend that this inconsistent treatment demonstrates an apparent discrepancy between Duke's actions and its rights under the easement or, alternatively, that the inconsistent treatment is not equitable. To the contrary, however, this argument is premised upon a misinterpretation of the rights and limitations conveyed in the controlling easement.

¶ 36 As noted above, the Kiser Grandparents granted two separate easements in the same conveyance. In relevant parts, the first easement "convey[ed] unto Duke . . . a permanent easement of . . . the right to clear, and keep clear from said 280.4 acres. . . all . . . structures . . . and . . . to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable by Duke . . . ." The second easement conveyed "unto Duke . . . a permanent flood easement . . . in connection with . . . the construction, operation, maintenance, repair, altering, or replacing of a dam" upon described land adjacent to the aforementioned 280.4 acres. While this second easement utilizes limiting language associated with Duke's operation of a dam, the first easement does not contain such limiting language. Rather, a plain reading of the first easement reveals that Duke possesses an unrestricted right, among others, to "clear, and keep clear . . . all . . . structures" upon the land. Though its actions upon the 280.4 acres are limited to those seemingly inexhaustive rights enumerated in the easement, Duke is not required to show that its use of the 280.4 acres of land is consistent with a greater purpose. Duke may eliminate interferences with its permanent easement rights to the 280.4 acres, consistent with its easement.

B. Navigability of Lake Norman

¶ 37 **[3]** Irrespective of easements and also arguing that the Third Parties have a common-law right to use the waters of Lake Norman above the Kiser's submerged land for recreational activities and to erect and maintain docks and other such structures that provide access from the Third Parties' lots to the waters of Lake Norman, Duke and the Third Parties assert the public trust doctrine and riparian rights respectively.

¶ 38 Exploring the first claim, the public trust doctrine is a common-law principle recognized by statute that provides for the public use of both public and private lands and resources consistent with certain activities such as "the right to navigate, swim, hunt, fish, and enjoy all recreational activities." *Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 88, 780 S.E.2d 187, 194 (2015) (citations omitted); N.C. Gen. Stat. § 1-45.1 (2020). This doctrine applies to navigable waters. *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988). When determining whether a body of water is navigable for the purpose of the public trust doctrine, this State has historically adopted several tests over nearly 200 years, that include the "ebb and flow" test, *Wilson v. Forbes*, 13 N.C. 30, 38 (1828), "sea vessel" test, *State v. Glen*, 52 N.C. 321, 333 (1859), and "navigable in fact" test, *State v. Twiford*, 136 N.C. 603, 606, 48 S.E. 586, 588 (1904). Currently, "the test of navigability in fact controls in North Carolina" and is described as follows:

> " 'If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.' " . . . In other words, if a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose.

Gwathmey v. State of North Carolina, 342 N.C. 287, 299, 301, 464 S.E.2d 674, 682 (1995) (quoting *Twiford*, 136 N.C. at 608-09, 48 S.E. at 588). This test applies not only to ocean waters but also to inland rivers and lakes. *State v. Narrows Island Club*, 100 N.C. 477, 481 (1888).

¶ 39 Consistent with the navigable-in-fact test, the "natural condition" element espoused in *Gwathmey* "reflects only upon the manner in which the water flows without diminution or obstruction." *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 135, 693 S.E.2d 208, 212 (2010). Thus, even

artificial or man-made bodies of water are subject to navigability for the purpose of the public trust doctrine. *Id.* When evaluating the navigability of an artificial lake, however, our sparse caselaw on the matter further suggests that an artificial lake is not navigable in its natural condition merely because boats can navigate its surface. Indeed, a party must "show that the [feeding waterway of the lake] is passable by watercraft over an extended distance both upstream of, under the surface of, and downstream from the lake." *Bauman v. Woodlake Partners, LLC*, 199 N.C. App. 441, 453, 681 S.E.2d 819, 827 (2009).

¶ 40 Artificial bodies of water may be navigable only when they arise from or are connected to already natural, navigable-in-fact waters. When positing navigability, though, "the mere fact that a dam has been placed across a navigable stream, without more, [does not] suffice[] to render that stream non-navigable." *Id.* at 451, 681 S.E.2d at 826.

¶ 41 Exploring the second claim, riparian rights are likewise the product of our common law. "Riparian rights are vested property rights that . . . arise out of ownership of land bounded or traversed by navigable water." *In re Protest of Mason*, 78 N.C. App. 16, 24-25, 337 S.E.2d 99, 104 (1985) (citation omitted). Irrespective of the ownership of submerged land, riparian owners enjoy "the right of access over an extension of their waterfronts to navigable water, and the right to construct wharfs, piers, or landings." *Pine Knoll Ass'n v. Cardon*, 126 N.C. App. 155, 159, 484 S.E.2d 446, 448 (1997) (quoting *Bond v. Wool*, 107 N.C. 139, 148, 12 S.E. 281, 284 (1890) (alterations omitted)). As with the public trust doctrine, the existence of riparian rights hinges upon an "identical" navigability test. *Newcomb v. County of Carteret*, 207 N.C. App. 527, 542, 701 S.E.2d 325, 337 (2010). Similarly, then, a riparian owner may possess access rights to an artificial body of water. *Id.*

¶ 42 In the present case, because Duke and the Third Parties assert the public trust doctrine and the existence of riparian rights for the first time on appeal, the trial court was not given the opportunity to hear arguments for or against the navigability of the Catawba River and consequently Lake Norman and made no findings concerning these issues. To determine if a watercourse is navigable-in-law is to consider if it is navigable-in-fact, "[t]he navigability of a watercourse is therefore largely a question of fact," *State v. Baum*, 128 N.C. 600, 604, 38 S.E. 900, 901 (1901), and, thus, is a determination that this Court is prohibited from considering.

¶ 43 This Court may only hear issues of law and is barred from making findings of fact. *Weaver v. Dedmon*, 253 N.C. App. 622, 627, 801 S.E.2d

131, 136 (2017). Rather, a jury is entrusted to review "evidence tending to show that the stream in question is passable by watercraft over an extended distance both upstream of, under the surface of, and downstream from the lake." *Bauman*, 199 N.C. App. at 453, 681 S.E.2d at 827. While a prior opinion of this Court has suggested that the Catawba River may be navigable in its natural state, it has only done so in *dicta*. *Id.* at 451, 681 S.E.2d at 826 (noting that, by considering dams when making navigability decisions, "many of the major rivers in North Carolina, such as the Catawba and the Yadkin, would become non-navigable, which would be a troubling result"). "Language in an opinion not necessary to the decision is *obiter dictum*[,] and later decisions are not bound thereby." *Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (citations omitted); *see also Washburn v. Washburn*, 234 N.C. 370, 373, 67 S.E.2d 264, 266 (1951). Despite Duke's assertion to the contrary, the record does not show undisputed facts or contentions, which prove the navigability of the Catawba River consistent with the requirements and considerations above. This absence presents a genuine issue of material fact to be further determined.

III. Conclusion

¶ 44 We hold the trial court erred in granting summary judgment in favor of Duke and the Third-Parties and in granting use rights to the Third-Parties of the docks and other such structures over and into the Kisers' submerged 280.4 acres upon a cloud-upon-title theory. To hold otherwise would authorize the taking of the Kisers' property without just compensation. For the reasons outlined above, we reverse and remand for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges TYSON and COLLINS concur.

IN RE W.C.T.

[280 N.C. App. 17, 2021-NCCOA-559]

IN THE MATTER OF W.C.T., W.J.A.T., & W.D.T.

No. COA21-178

Filed 19 October 2021

1. Child Abuse, Dependency, and Neglect—adjudication of abuse —unexplained injuries—inference of non-accidental means

The trial court did not err by adjudicating a child abused—based on severe burns the child suffered when he was three months old while in the exclusive care of his paternal grandmother—where the unchallenged findings of fact were supported by clear and convincing evidence and in turn supported an inference that the child's injuries were caused by non-accidental means. The parents created a substantial risk of physical injury by allowing the grandmother, who had previously displayed unstable behavior, to continue to care for the child and his siblings. Further, both the parents and the grandmother gave inconsistent and improbable theories to explain how the injury occurred and the parents did not cooperate with the agencies tasked with investigating the incident.

2. Child Abuse, Dependency, and Neglect—adjudication of dependency—inability to care for children—findings of fact

The trial court properly adjudicated three children as dependent—after the youngest child suffered severe burns by unexplained means while in the paternal grandmother's care—based on unchallenged findings of fact, which were supported by clear and convincing evidence, demonstrating that the parents' lack of adequate supervision led to the youngest child's injury, that they could not provide an alternative plan of care after a temporary placement ended, and that they were unable to meet the children's medical and educational needs.

3. Child Abuse, Dependency, and Neglect—steps toward reunification—proof of income—mental health treatment—reasonably related to risk factors in home

In a dispositional hearing after three children were adjudicated neglected and dependent and one of the three was also adjudicated abused, the trial court did not err by requiring a mother to show proof of a sufficient source of income and to "refrain from allowing mental health to impact parenting" (by, in part, participating in mental health treatment) as part of the reunification plan. The conditions were reasonably related to remedying the reasons for

the children's removal from the home, which were lack of care and supervision and suspected domestic violence.

4. Child Abuse, Dependency, and Neglect—visitation—high level of supervision—trial court's discretion

In a dispositional hearing after three children were adjudicated neglected and dependent and one of the three was also adjudicated abused, the trial court did not abuse its discretion when it limited a mother's visitation with the children to one hour of highly-supervised weekly visits where it reasonably based its decision on recommendations from the guardian ad litem and social workers, and left open the option for the children's foster family and parents to agree to additional visitation time.

5. Appeal and Error—waiver of constitutional issue—right to parent—notice and opportunity to be heard

Where a mother in an abuse, neglect, and dependency matter was on notice that guardianship with a third party was recommended for her three children and would be considered at the dispositional hearing, she waived any argument on appeal that her constitutional right to parent was violated by failing to raise that issue when she had the opportunity.

Appeal by respondents from order entered 17 December 2020 by Judge Kathryn W. Overby in Alamance County District Court. Heard in the Court of Appeals 11 August 2021.

Wendy Walker for Petitioner-Appellee Alamance County Department of Social Services.

Office of the Parent Defender, by Parent Defender Wendy C. Sotolongo and Assistant Parent Defender J. Lee Gilliam, for Respondent-Appellant-Mother.

Edward Eldred for Respondent-Appellant-Father.

Forrest Firm, P.C., by Brian C. Bernhardt, for Guardian ad Litem.

CARPENTER, Judge.

¶ 1 Respondent-Mother and Respondent-Father (collectively "Respondents") appeal from the trial court's Adjudication and

Disposition Order adjudicating minor child, Wade,[1] as an abused, neglected, and dependent juvenile; adjudicating the other two minor children, Wes and Wren, as neglected and dependent juveniles; and vesting custody of the children with Alamance County Department of Social Services ("ACDSS"). Respondents argue the trial court erred in adjudicating Wade abused and dependent, and adjudicating Wes and Wren dependent. Respondent-Mother also argues the trial court abused its discretion by limiting her visitation with the children to highly supervised, one-hour weekly visits; requiring proof of income; and ordering her to "refrain from allowing mental health to impact parenting." Finally, Respondent-Mother contends the trial court erred in concluding she acted inconsistently with her constitutionally protected status as a parent. For the reasons set forth below, we affirm the Adjudication and Disposition Order.

I. Factual & Procedural Background

¶ 2 Respondent-Mother and Respondent-Father are the biological parents of three children: "Wes," eight years old; "Wren," three years old; and "Wade," one year old. Respondent-Mother is legally married to her estranged husband, Peter, and was married to, but separated from, Peter[2] prior to the births of the three children. Peter is not a party to this appeal.

¶ 3 On 12 March 2020, Wade, then three months old, was taken to Moses Cone Hospital for second and third degree burns on 8.3% of his left thigh, left calf, and left foot. Immediately after arriving to Moses Cone Hospital, Wade was transferred to Wake Forest Baptist Medical Center/ Brenner Children's Hospital ("BCH") for treatment by its burn team. The injury was not witnessed, and the parties have offered multiple, inconsistent, and implausible stories to explain the circumstances surrounding the child's injury.

¶ 4 Respondents reported to Moses Cone Hospital staff that Wade was in a baby swing or rocker downstairs when their German Shepherd dog knocked over the swing. Respondents alleged that Wade fell out of the swing and was pushed up against an electrical space heater for what they estimated was approximately thirty minutes; they reported finding him laying against the heater. Respondents claimed to have immediately transported Wade to the hospital after discovering his injuries. Respondents also told this story to both BCH staff and a Forsyth

1. Pseudonyms have been used to protect the identities of the children.

2. A pseudonym has been used.

County Department of Social Services ("FCDSS") social worker who interviewed them on 13 March 2020. During the interview with the social worker, Respondent-Mother admitted Wade was not yet able to roll over at the time of injury.

¶ 5 BCH triage notes indicate the "burn distribution is consistent w[ith the] story" Respondents told. The notes also document concerns regarding: the child being left unattended by a heater, the thirty- to forty-minute period for which Respondents could not account, how a dog knocked over the swing, why the space heater was left on during a hot day, and why the parents did not immediately hear the child's cries. The initial screening for domestic violence, abuse, and neglect did not raise concerns; however, child abuse protocol was initiated by BCH on 13 March 2020 at 2:30 a.m. after BCH received an anonymous phone call from someone who claimed to be familiar with Respondent's family and sought the case be reported to Child Protective Services ("CPS"). The caller claimed to have recordings of the paternal grandmother threatening Wade the day of his injury. The caller also stated that the paternal grandmother often leaves the children unattended and claimed Respondent-Mother was at risk for abuse. The attending physician referred Wade for a consultation with Dr. Meggan Goodpasture of the BCH Pediatric Child Protection team. Dr. Goodpasture met with the maternal grandmother and Respondent-Father. Although the maternal grandmother expressed safety concerns in her meeting with Dr. Goodpasture, the family had no subsequent meetings with the doctor because Respondent-Father advised BCH that he did not want Dr. Goodpasture in Wade's hospital room again. Based on Dr. Goodpasture's initial consultation, she recommended, *inter alia*, CPS and law enforcement reconstruct the scene of the injury and perform full child medical evaluations on each of the three children.

¶ 6 Guilford County Department of Social Services ("GCDSS") received a report for physical abuse concerning Wade on 13 March 2020. Later that day, GCDSS sent a request to FCDSS to assist in the investigation. Social Worker Pope of FCDSS interviewed nurse staff of BCH as well as the Respondents. After Social Worker Pope left Wade's hospital room, Respondent-Father stated to the attending nurse, Nurse Green, that the social worker told him the burn was caused by boiling water. He then became "visibly upset" and stated, "I feel like I'm being accused of a crime that I did not commit." Respondent-Father indicated an unidentified staff member in scrubs had also commented the burn was "from boiling water." Nurse Green was able to "diffuse the situation" by indicating physicians did not have suspicions of Respondents' story, Respondent-Father became more at ease and mentioned he has

post-traumatic stress disorder ("PTSD") from being "burned and abused" by his own father, which caused him to distrust "the system." Neither the emergency department notes, nor the social workers' reports state the burn was caused by boiling water.

¶ 7 On 27 March 2020, Dr. John Bailey of the BCH burn team entered a progress note regarding Wade's case. He documented he and Dr. Goodpasture agreed Wade "appear[ed] to have suffered a contact burn." He also noted that neither of the doctors could "offer more than a speculation regarding the true mechanism [of the injury], although involvement of the pet seems less likely."

¶ 8 On 1 April 2020, a Child and Family Team meeting was held between GCDSS, Respondent-Mother, and Respondent-Father. At the meeting, Respondents agreed to enter a safety agreement whereby the children would be placed with the maternal grandparents as a temporary safety provider, Respondents would not have unsupervised visits or overnight stays with the children, and Respondents would receive mental health services. Wade was discharged from BCH into the maternal grandparents' care the following day.

¶ 9 On 2 April 2020, another Child and Family Team meeting was held via conference call with Respondents, GCDSS, and the paternal grandmother, and Krispen Culberton ("Attorney Culberton")—attorney for Respondents' family. Attorney Culberton reported Respondents' concerns for Wren's behavior and her aggression towards Wade. According to Attorney Culberton, Respondents were afraid to report they believed Wren caused Wade's injuries. The paternal grandmother claimed at the meeting she was the sole caretaker of the juveniles when Wade was injured. According to the paternal grandmother's version of events, she fed Wade and laid him in his bassinet, she put Wren down in her playpen, and she went downstairs to prepare dinner. She later sent Wes upstairs to check on Wren and Wade. Immediately after, Wes came running downstairs screaming Wade had been burned. The paternal grandmother speculated that Wren climbed out of her playpen, pulled Wade out of his bassinet, and climbed back into her playpen. Following the injury, the paternal grandmother treated Wade's burns with Vaseline before taking him to the hospital. Respondents adopted this story and later reported this account of events to Detective Gerald Austin ("Detective Austin") of the Guilford County Sheriff's Department, who handled the criminal investigation into Wade's injury.

¶ 10 On 16 April 2020, a child medical evaluation was performed on each of the three children by Dr. Esther Smith of the Cone Health

Child Advocacy Medical Clinic, as recommended by Dr. Goodpasture. In Dr. Smith's opinion, "it is possible that [Wade's] injuries are consistent with having been burned by prolonged direct or near-direct contact with [Respondents'] space heater"; however, she noted "there is a very high concern for [an i]ntentional[ly i]nflicted injury (at worst) . . . and/or [n]eglect resulting in [an u]nintentional [i]njury (at best)." She expressed concerns for the red flags identified by BCH as well as concerns for the "very unsafe infant sleep environment" which included lack of supervision, close proximity to a heat source, suffocation risk due to excess blankets in bassinet, and potential fall risk due to a cradle that may have been improperly assembled.

¶ 11 In May of 2020, the case was transferred from GCDSS to ACDSS due to a potential conflict of interest that arose after Respondent-Father and his attorney threatened to sue GCDSS and/or its employees over an alleged HIPAA violation.

¶ 12 On 21 July 2020, concerns arose regarding the kinship placement with the maternal grandparents when ACDSS social workers arrived at the maternal grandparents' home unannounced and found the maternal grandmother overwhelmed with caring for the children. The maternal grandmother admitted that she was frustrated by Respondents' tardiness to scheduled visitations. She also admitted to "backhand[ing]" Wren after Wren spit in her face. ACDSS immediately terminated the kinship placement and advised Respondents that a replacement temporary safety provider was needed.

¶ 13 On 21 July 2020, the children were placed with a neighbor of the maternal grandparents who agreed to be a temporary placement until 21 August 2020. Respondents gave ACDSS the name of another family for a potential placement. However, one of the proposed caretakers of the new family was an employee of ACDSS so the agency concluded the family was ineligible due to a conflict of interest. In August of 2020, ACDSS received multiple phone calls from individuals who claimed Respondents were seeking potential placements off the street and through social media. ACDSS held a Child and Family Team meeting with Respondents on 21 August 2020 to inform them that the agency would need to seek court involvement if Respondents could not provide a viable placement option. After Respondents did not provide an alternative placement, ACDSS informed the parents that it would be filing a non-secure order for custody of the children.

¶ 14 On 21 August 2020, ACDSS filed a petition alleging Wade was an abused, neglected, and dependent juvenile, and petitions alleging Wes

and Wren were neglected and dependent juveniles. The petitions alleged, *inter alia*: (1) "that [Wade's] parents and/or caretaker have inflicted or allowed to be inflicted serious physical injury, possible by other than accidental means and/or created a serious risk of physical injury by other than accidental means"; (2) that "[t]he juveniles have been neglected in that the juveniles do not receive appropriate care, supervision, or discipline from their parents and/or caretaker"; (3) "[t]hat the parents do not have an appropriate plan of care for the juveniles"; and (4) "[t]hat the juveniles would be at significant risk of harm if placed with the parents and/or paternal grandmother."

¶ 15 On 21 August 2020, the Alamance County District Court issued orders for nonsecure custody of the three children, finding a reasonable factual basis to conclude the children were exposed to a substantial risk of physical injury. The court ordered the children placed in nonsecure custody with ACDSS and set a hearing on 26 August 2020 to determine the need for continued nonsecure custody. ACDSS obtained nonsecure custody of the children and placed them together in a foster home in Moore County.

¶ 16 On 26 August 2020, a hearing was held before the Honorable Kathryn W. Overby to determine the need for continued non-secure custody of the children. Following the hearing, Judge Overby entered an order on 16 September 2020 finding, *inter alia*, that the juveniles' return to their own home would be contrary to the best interests of the juveniles, and mandating, *inter alia*, that temporary custody of the juveniles be continued in ACDSS for non-secure placement.

¶ 17 An adjudication hearing was held between 18 November 2020 and 20 November 2020 before Judge Overby. Testimony was given by two social workers familiar with the case, Respondent-Mother, Respondent-Father, the maternal grandmother, a co-worker of Respondent-Mother, Detective Austin, and the guardian *ad litem* for the children.

¶ 18 Detective Austin testified he investigated the case after he became aware through BCH that a child "suffered burns under suspicious circumstances . . . ." Detective Austin spoke with Respondent-Mother and Respondent-Father while they were visiting BCH on 18 March 2020, to make them aware of his investigation. Respondent-Father used a recording device to record his conversation with Detective Austin and advised he had an attorney.

¶ 19 Detective Austin testified he obtained a search warrant to search Respondents' home and executed the search warrant on 19 March 2020. Two GCDSS social workers accompanied him during his search of the

home. Detective Austin testified he seized the space heater that was alleged to have been the mechanism of the injury and took photographs of Respondents' home. He later performed tests on the heater using a "calibrated thermometer to record temperatures at . . . different points" of the heater. He determined that at the vents of the heater, the temperature fluctuated between 178.7- and 248.6-degrees Fahrenheit, rather than keeping a steady temperature. The vents were the warmest points of the heater. Following Detective Austin's investigation, Respondent-Father, Respondent-Mother, and the paternal grandmother were charged with and arrested for felony negligent child abuse resulting in serious bodily injury.

¶ 20 Respondent-Mother testified as to the events of 12 March 2020. According to Respondent-Mother, she called her mother to pick her up because Respondent-Father took the truck she had driven to work, to get it fixed and inspected, and he was not answering his phone. Respondent-Mother testified she left the store between 5:00 p.m. and 5:30 p.m. When asked why she gave multiple stories regarding Wade's injury, Respondent-Mother responded that she and Respondent-Father "panicked," and "were terrified that something was going to happen to [Wren]."

¶ 21 The maternal grandmother testified that Respondent-Mother called her upset and crying at about 4:00 p.m. on 12 March 2020 and told her mother she did not have a ride home; the maternal grandmother agreed to pick up Respondent-Mother at the end of her shift. Shortly after 5:00 p.m., Respondent-Mother called the maternal grandmother to tell her she was ready to be picked up. When the maternal grandmother arrived around 5:30 p.m., Respondent-Mother stated, "she did not want to go back home" and requested to go to the maternal grandmother's house instead. Respondent-Mother told the maternal grandmother that Respondent-Father and the paternal grandmother leave the children alone, and Respondent-Mother has found the children alone when she has come home from work. At approximately 6:00 p.m., Respondent-Father arrived at the maternal grandmother's house. Respondents spoke in the driveway for approximately two hours regarding "some incidents that were happening at the store" where Respondent-Mother worked. The maternal grandmother testified that Respondent-Father's phone "kept ringing," and he "eventually . . . tossed it over into the yard . . . ." When Respondent-Mother was asked at the hearing if she was arguing with Respondent-Father at the maternal grandmother's home on the evening of 12 March 2020, Respondent-Mother stated they were discussing her job because she was trying to have the district manager transfer

her co-worker "Robert,"[3] who had been "making sexual advances towards" her.

¶ 22 The record reveals the paternal grandmother called Respondent-Father eighteen times between 7:01 p.m. and 7:52 p.m. and Respondent-Father answered just one of her calls at 7:52 p.m. Respondent-Father then "hurried [Respondent-M]other home without telling her the nature of the phone call." The maternal grandmother's testimony indicates Respondents left her home between 8:00 p.m. and 8:20 p.m. According to Respondent-Mother, she and Respondent-Father arrived at their home at about 8:15 p.m. Respondent-Mother testified Wade was not crying when they got home. She took him upstairs to look at his burns. Shortly thereafter, Respondents took Wade to the hospital.

¶ 23 Respondent-Mother's co-worker Robert testified regarding events that had transpired at the store and incidents in which Respondent-Mother had confided in him. According to Robert, he would "hear things from other people" about Respondent-Mother and would ask Respondent-Mother if they were true. On one such instance, Robert asked Respondent-Mother if the paternal grandmother "had pulled a gun on her when [Wes] was a young boy . . . and told [Respondent-Mother] that she would hurt her and no one would ever find her," while the two were in the presence of Wes. Robert testified Respondent-Mother confirmed this incident had occurred. Robert also testified to speaking with Respondent-Mother the day of Wade's injury. Respondent-Mother told him that just the day before, on 11 March 2020, "she . . . went home and the kids were at home by [themselves], and it was a couple hours later that [the paternal grandmother] and [Respondent-Father]" arrived home. On the day of 12 March 2020, Robert testified he saw Respondent-Father and the paternal grandmother behind the store dumping their personal trash in the store's dumpster. He did not see the three children in the pickup truck. Later that day, Robert overheard the store's manager on duty taking a call from the paternal grandmother. Robert testified he could hear the paternal grandmother through the phone using obscenities referring to the Respondent-Mother and stating, "[Respondent-Mother] needs to come home and take care of her children or someone would take care of them for her."

¶ 24 An initial disposition hearing was held before Judge Overby on 20 November 2020 following the adjudication hearing. After the presentation of all evidence, the trial court announced its judgment in open court and ordered custody of the juveniles be vested with ACDSS.

3. A pseudonym has been used.

On 17 December 2020, the trial court entered the Adjudication and Disposition Order in which it made factual findings supported by clear and convincing evidence to conclude Respondents and/or a caretaker inflicted or allowed to be inflicted serious physical injury possible by other than accidental means and/or created a serious risk of physical injury by other than accidental means, Respondents and/or a caretaker did not provide appropriate care or supervision for the juveniles, and Respondents and/or a caretaker created an injurious environment placing the juveniles at substantial risk of harm. The trial court also concluded Wade is an abused, neglected, and dependent juvenile, and Wes and Wren are neglected and dependent juveniles. Respondent-Mother and Respondent-Father each filed timely notices of appeal from the Adjudication and Disposition Order.

II. Jurisdiction

¶ 25 This Court has jurisdiction to address Respondent-Father's and Respondent-Mother's appeals from the Adjudication and Disposition Order pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019) and N.C. Gen. Stat. § 7B-1001(a)(3) (2019).

III. Issues

¶ 26 On appeal, Respondent-Mother and Respondent-Father raise two common issues: (1) whether the trial erred in adjudicating Wade an abused juvenile; and (2) whether the trial court erred in adjudicating Respondents' three children dependent juveniles. Respondent-Mother raises three additional issues: (1) whether the trial court erred in ordering Respondent-Mother to show proof of income and to refrain from allowing mental health to impact parenting as steps to remedy the conditions in the home that led to the juveniles' adjudications; (2) whether the trial court abused its discretion in limiting Respondent-Mother's visitation with the children to highly supervised, one-hour weekly visits; and (3) whether the trial court erred in concluding Respondent-Mother had acted inconsistently with her constitutionally protected parental status.

IV. Adjudication

A. Standard of Review

¶ 27 "The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2019). "When reviewing a trial court's order adjudicating a juvenile abused, neglected, or dependent, this Court's duty is 'to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions

are supported by findings of fact.' " *In re F.C.D.*, 244 N.C. App. 243, 246 780 S.E.2d 214, 217 (2015) (quoting *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (citation, quotation marks, and brackets omitted), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008)). "If supported by competent evidence, the trial court's findings are binding on appeal even if the evidence would also support contrary findings." *Id.* at 246, 780 S.E.2d at 217 (citation omitted). Unchallenged findings of fact are deemed supported by competent evidence and binding on appeal. *In re J.M.W.*, 179 N.C. 788, 792, 635 S.E.2d 916, 919 (2006) (citation omitted). The determination of whether a child is abused, neglected, or dependent is a conclusion of law. *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999). The trial court's conclusions of law are reviewed *de novo*. *In re Pope*, 144 N.C. App. 32, 40, 547 S.E.2d 153, 158 (citation omitted), *aff'd*, 354 N.C. 359, 554 S.E.2d 644 (2001).

B. Adjudication of Abuse

1. *Findings of Fact regarding Abuse*

¶ 28 **[1]** On appeal, Respondent-Mother argues the trial court erred in adjudicating Wade abused on the basis there was no clear and convincing evidence that the injuries were "other than accidental." Similarly, Respondent-Father contends "[t]he trial court's evidentiary findings of fact do not support the ultimate finding that Wade's injury was non-accidental"; rather, the findings establish that the injury was "caused by a 'lack of supervision.' "

¶ 29 The Juvenile Code defines an "abused juvenile" in pertinent part as

> [a]ny juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker:
>
> a. [i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; [or]
>
> b. [c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means.

N.C. Gen. Stat. § 7B-101(1)(a)-(b) (2019).

¶ 30 "This Court has previously upheld adjudications of abuse where a child sustains non-accidental injuries, even where the injuries were unexplained." *In re J.M.*, 255 N.C. App. 483, 495, 804 S.E.2d 830, 838–39 (2017); *see In re T.H.T.*, 185 N.C. App. 337, 648 S.E.2d 519 (2007) (affirming an abuse adjudication where a physician concluded a child's skull fracture

was caused by non-accidental means, the mother's explanations were not consistent with the injuries observed, and the mother failed to seek medical attention for the child). Additionally, this Court has held that a respondent mother's knowledge of a substantial risk of serious physical injury posed to her children was sufficient to conclude that respondent "allowe[d] to be created a substantial risk of serious physical injury to the juvenile[s] by other than accidental means." *In re M.G.*, 187 N.C. App. 536, 549, 653 S.E.2d 581, 589 (2007), *rev'd in part on other grounds*, 363 N.C. 570, 681 S.E.2d 290 (2009) (upholding an abuse adjudication where the respondent mother knew of the respondent father's violent and abusive nature and "failed to take the necessary steps to protect [her] minor children"). As our Court stated in *In re K.L.*, the exact cause of a child's injury may be unclear in a case involving an adjudication of abuse; however, if the trial court's findings of fact support the inference the respondents are responsible for the unexplained injury by clear and convincing evidence, the abuse adjudication will be affirmed. 272 N.C. App. 30, 40, 845 S.E.2d 182, 191, *disc. rev. denied*, 2020 N.C. LEXIS 1353 (2020).

¶ 31 In the instant case, the trial court concluded Respondents had "inflicted or allowed to be inflicted serious physical injury, possible by other than accidental means and/or created a serious risk of physical injury by other than accidental means" and "did not provide appropriate care or supervision for the juveniles and created an injurious environment placing the juveniles at substantial risk of harm." The trial court made the following pertinent findings of fact, which support its adjudication of abuse:

> 27. On March 12, 2020, the respondent parents along with the three juveniles lived with . . . the respondent father's mother (paternal grandmother to the juveniles) . . . .
>
> 28. The respondent mother was employed . . . and worked approximately sixty (60) hours each week,
>
> 29. The respondent father was not employed. He indicated to hospital employees that he has post-traumatic stress disorder (PTSD).
>
> 30. The respondent mother told co-worker [Robert] and her mother . . . that she had found [her children] alone and unsupervised on March 11, 2020 when she came home from work. She had no idea how long the juveniles had been left alone in the home.

31. On March 12, 2020 the respondent mother told [Robert] and her mother that she was upset about finding the juveniles alone the day before.
32. The respondent mother told Robert and her mother that [the paternal grandmother] had held a gun to her while she was holding [Wes] as an infant. She reported that this was due to [the paternal grandmother] not taking her medication.
33. On July 14, 2018, the respondent parents spoke to a clinical social worker and the respondent mother noted that [the paternal grandmother] "can be verbally abusive to her" due to [the paternal grandmother's] non-compliance with her medication.
34. On March 12, 2020, the respondent mother worked her shift . . . . During the shift the paternal grandmother drove the respondent father to the [respondent mother's work] to get the pick-up truck that the respondent mother had driven to work that day. She was left without any way to get home after her shift. The respondent mother called the respondent father multiple times to pick her up and bring her home, but he did not answer any of her calls or texts. According to her co-worker and her mother, the respondent mother was very upset and crying that day. The respondent mother called her mother . . . to come pick her up from [work].
35. Around 4:30 pm [Robert] saw the respondent father and [the paternal grandmother] at [the respondent mother's work] together in the pick-up truck without the juveniles.
36. [The maternal grandmother] took the respondent mother to her house and not to the respondent mother's home on March 12, 2020 between 5:30 pm and 6:00 pm.
37. After the respondent mother had left [work], the respondent father arrived and inquired if the respondent mother was still there.

38. After the respondent father left [the respondent mother's work] (sometime after 6:00 pm), [the paternal grandmother] arrived and came inside the store and left a few minutes later.

39. After appearing at [the respondent mother's work], [the paternal grandmother] called the store several times and spoke to the manger [sic]. [Robert] heard [the paternal grandmother] call the respondent mother names and said the respondent mother had been at work since 6:00 a.m. and that she needed to come home and take care of her kids and if she doesn't come home someone will take care of her kids for her.

40. The respondent father came to [the maternal grandmother's] home and spoke to the respondent mother and [the maternal grandmother] for approximately two hours. During the conversation, the respondent father's phone rang approximately eighteen (18) times with the paternal grandmother calling him, between 7:01 and 7:52 pm. He did not answer and tossed his phone at one point because he was tired of the repeated calls. At 7:52 pm the respondent father answered the call from his mother and then hurried the respondent mother home without telling her the nature of the phone call. The paternal grandmother did not call the respondent father again until 8:42 pm, right as the respondent parents arrived at Moses Cone hospital with [Wade].

. . . .

42. When the respondent parents returned home, [the paternal grandmother] was holding [Wade] (the youngest juvenile) in her arms, wrapped in a blanket and she told the respondent parents that [Wade] had been burned. The respondent mother took [Wade], walked him up the stairs, laid him down and unwrapped the blanket to inspect his injuries (which were bleeding, blistered, and oozing at that time) before she wrapped him back up and took him downstairs and out to the car. The respondent parents then took [Wade] to Moses Cone hospital.

43. They arrived at Moses Cone hospital at 8:41 pm. Both respondent parents told hospital employees that [Wade] was in his swing when the family dog knocked over the swing causing [Wade] to fall out of the swing and onto a space heater. That this happened just prior to arrival and they came immediately to Moses Cone. This series of events was a complete lie that was told by both parents and the paternal grandmother over and over to hospital employees, social workers, and law enforcement. The respondent parents did not just panic and tell a story about [Wade's] injuries on March 12, 2020; they conspired together with [the paternal grandmother] to develop a completely false narrative.
44. At no time between [the paternal grandmother] discovering [Wade's] injury and arrival at 8:41 pm did anyone call 911. [The paternal grandmother] did not call 911 while she was at home alone with the juveniles; instead she called the respondent father 18 times before he answered his phone. The respondent parents did not call 911 after learning of the injuries, when they saw [Wade] at the home or on the way to the hospital.
45. The lack of supervision of these juveniles led to [Wade] sustaining his injuries.
46. [Wade] was transported via ambulance to Wake Forest Baptist Medical Center (WFBMC)/ Brenner's Children's Hospital at 11:15 pm. By 2:30 a.m. abuse protocol was initiated, and security was placed bedside for [Wade]. There was a note that a social worker consult was required because of "vague explanations by parents" of the mechanism of [Wade's] injuries.
47. The WFBMC records have different stories about how [Wade] sustained his injuries: He was in a rocker, glider, tripod swing, or wooden bassinet; he was knocked out of the swing and onto the heater; he rolled out of the rocker and rolled into the heater. At some point, a physician notes that [Wade's] burns were consistent with burns

from a heater, but it was not likely that there was a dog involved.

48. [Wade] sustained first, second, and third degree burns to 8.3 percent of his body area, concentrated on the left thigh, calf, and foot. He had second degree burns around his left hip area and a slight first degree burns to the left abdomen and under his left arm. He required surgery to remove the dead skin. [Wade] remained at WFBMC until April 2, 2020.

49. Guilford County social worker (SW) Cquadayshia Sharpe received an investigative assessment for physical abuse and/or injurious environment that required immediate response on March 13, 2020.

50. SW Sharpe went to [the respondents' home] and met with [the paternal grandmother] on March 13, 2020. [The paternal grandmother] would not allow SW Sharpe inside the home or to have access to the two juveniles that were present [Wren and Wes]. When SW Sharpe indicated that she would have to get law enforcement involved if she could not see the two juveniles, [the paternal grandmother] brought the juveniles outside. SW Sharpe tried to talk to [Wes], but [the paternal grandmother would answer the questions for the juvenile.

. . . .

52. The respondent father indicated to hospital employees and the Guilford County Department of Social Services (GCDSS) that he hired an attorney within days of March 12, 2020.

53. SW Sharpe was never allowed into the home voluntarily by the respondent parents or [the paternal grandmother]. She set up one walk through for March 16, 2020, however, the respondent father called and canceled that on advice of counsel.

. . . .

64. There are many inconsistencies in the respondent parents' stories about this incident, as delineated in the findings of fact and also including,

but not limited to, the heater being run for days even though it was warm outside, [Wade] only wearing a diaper and shirt even though it was cold enough to run the heater, and the children were being kept in that room to keep them warm.

. . . .

93. Although respondent mother had concerns with [Wren's] behaviors at her 12-month well child checkup, respondent mother did not attend a parent educator appointment nor did [Wren] attend her 15-month well child appointment. The respondent parents brought up [Wren's] challenging behaviors (and specifically repeated attempts to hurt other people) at [Wade's] one-month well baby check on January 17, 2020 but cancelled her 18-month appointment three times in the month of February and rescheduled when she was 20 months old (March 30, 2020). The respondent parents had allowed [Wren's] Medicaid coverage to lapse. The respondent parents have not attended to [Wren's] medical needs as necessary.

94. If the respondent parents had such a concern about [Wren's] behavior's towards others, leaving she and [Wade] in a bedroom unattended would not have been appropriate.

95. "Although it is possible, I find it highly unlikely that [Wren] climbed out of her crib, displaced [Wade] from his cradle, and then climbed back into her crib." This statement from Dr. Esther Smith, MD was noted on page 16 of [Wren's] CME.

. . . .

99. [Wade] did not roll over by himself until he was placed in kinship placement with the [maternal grandparents], which would have been sometime after April 2, 2020. He could not roll over by himself on March 12, 2020.

100. Dr. Esther Smith, MD indicated that [Wade's] sleeping environment was unsafe in that it was in close proximity to a heat source, there were

excessive blankets creating a suffocation risk, and a fall risk due to an improperly assembled rocking cradle.

101. Dr. Esther Smith, MD spoke to Dr. Meggan Goodpasture, who reported meeting with [the maternal grandmother] and then with the respondent father. Dr. Goodpasture "felt the initial meeting was not even that inflammatory, dad just seemed controlling." Dr. Goodpasture was aware of an allegation of domestic violence between the parents, but the hospital "staff could never get mom alone." After Dr. Goodpasture advised [the maternal grandmother] to explain any safety concerns to CPS, she received a call from the hospital compliance department, advising that respondent father does not want her going back into [Wade's] room any further. This was documented on page 4 of [Wade's] CME.

102. That in regard to [Wade], the respondent parents and/or caretaker have inflicted or allowed to be inflicted serious physical injury, possible by other than accidental means and/or created a serious risk of physical injury by other than accidental means.

103. That the juveniles' parents and/or caretaker did not provide appropriate care or supervision for the juveniles and created an injurious environment placing the juveniles at substantial risk of harm.

¶ 32 Respondent-Mother contends finding of fact 102 is a conclusion of law. We agree. Accordingly, we will review finding of fact 102 as a conclusion of law below. *See Stan D. Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984) ("If [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal."). Respondents do not challenge any other findings of fact; therefore, the remaining findings of fact are deemed supported by competent evidence and are binding on appeal. *See In re J.M.W.*, 179 N.C. at 792, 635 S.E.2d at 919.

¶ 33 Respondent-Mother relies on *In re K.L.* in arguing the trial court's abuse adjudication must be reversed because there is no clear and

convincing evidence that Wade's injury was non-accidental. 272 N.C. App. 30, 845 S.E.2d 182. In *In re K.L.*, our Court reversed the trial court's order adjudicating a juvenile abused on the basis that there was "nothing to bridge the evidentiary gap between the unexplained injuries . . . and the conclusion that Respondents inflicted them . . . ." *Id.* at 46, 845 S.E.2d at 194. Multiple physicians testified at the adjudication hearing. *Id.* at 34–35, 845 S.E.2d at 187. Although one treating doctor who testified had ordered the child's entire body to be assessed for other injuries, he made no abnormal findings. *Id.* at 34, 845 S.E.2d at 187. Despite the lack of abnormal findings, the doctor opined that some type of physical abuse was "highly probable" because the parents could not provide a history to explain the six fractures in the child's legs. *Id.* at 34, 845 S.E.2d at 187. The Court reasoned that reversal of the abuse adjudication was proper on the ground there were no red flags in the record such as substance abuse, domestic violence, or inappropriate discipline or other evidence by which the trial court could infer the child was abused; thus, the fact that respondents could not explain the baby's fractures was insufficient to support the trial court's conclusion of abuse. *Id.* at 46, 845 S.E.2d at 194. Furthermore, the respondent mother did not delay in seeking medical treatment and was "forthcoming and cooperative" in DDS's investigation. *Id.* at 46, 845 S.E.2d at 194. Finally, there was no clear or convincing evidence to support the finding the child's injury had occurred while the child was in the exclusive care of the parents on a certain date. *Id.* at 37–38, 845 S.E.2d at 189–190.

¶ 34 We reject Respondent-Mother's contention that *In re K.L.* demands reversal of the trial court's adjudications in this case. We note it is undisputed that Wade's injury occurred on 12 March 2020 while he was in the exclusive care of the children's caretaker, the paternal grandmother. Here, unlike *In re K.L.*, there are ample, unchallenged findings of fact to support the inference the child's injury occurred by non-accidental means. *See id.* at 40, 845 S.E.2d at 191.

¶ 35 First, doctors and social workers pointed to multiple red flags of potential domestic abuse, which were documented in the trial court's findings of fact, including findings of fact 32, 33, 43, 46, 47, 64, 95, 99, and 100. These findings of fact establish the paternal grandmother had made several threats to or regarding Respondent-Mother or the children including on the day of Wade's injury; Respondents and the paternal grandmother conspired to create "false narratives"; Respondents and the paternal grandmother repeated multiple, inconsistent stories regarding the events surrounding Wade's injuries, who was caring for Wade on 12 March 2020, and when treatment was sought; Respondents provided

vague, improbable explanations regarding the mechanism of the injury; Respondents' final story of events blaming their toddler daughter was "highly unlikely"; and doctors treating Wade had reasons to suspect abuse in Respondents' home, including BCH receiving an anonymous call in which the caller alleged domestic abuse in Respondents' home. These unchallenged findings of fact are deemed supported by clear and convincing evidence. *See In re J.M.W.*, 179 N.C. at 792, 635 S.E.2d at 919.

¶ 36 Second, the findings of fact show there was a delay of approximately one hour and forty minutes from the time the paternal grandmother initially called Respondent-Father at 7:01 p.m. to report the injury to 8:41 p.m. when Wade was taken to the hospital for treatment; at no point did the paternal grandmother or either Respondent seek emergency medical services from 911 for Wade's severe burns.

¶ 37 Finally, findings of fact 50, 53, 63, 70, 73, 77, and 80 show Respondents were not "forthcoming" or "cooperative" with the agencies handling investigations into Wade's injuries, including GCDSS, ACDSS, and the Guilford County Sheriff's Office; rather, Respondents told a "complete lie" and multiple "false narratives" to explain Wade's injury and would not assist ACDSS with completing a review of Respondents' home to ensure concerns were addressed. *In re K.L.*, 272 N.C. App. at 46, 845 S.E.2d at 194. For the previously stated reasons, "the trial court's findings of fact . . . support the inference" Respondents and the paternal grandmother are responsible for Wade's injury, and the injury was non-accidental. *See In re K.L.*, 272 N.C. App. at 40, 845 S.E.2d at 191.

2. *Conclusions of Law regarding Abuse*

¶ 38 As an initial matter, we consider finding of fact 102 as a conclusion of law to determine whether it is supported by the findings of fact. *See In re F.C.D.*, 244 N.C. App. at 246 780 S.E.2d at 217. Respondent-Mother focuses on the trial court's lack of the essential element of "non-accidental means" to argue Respondents and the paternal grandmother did not *inflict* serious physical injury on Wade, in violation of N.C. Gen. Stat. § 7B-101(1)(a) (2019). She fails to address the trial court's conclusions that Respondents posed a "*substantial risk of harm*" to the children and there was a "serious risk of physical injury by other than accidental means" in the home. However, as analyzed in detail above, there are sufficient findings of fact to support the legal conclusions that the injury was non-accidental, and Wade is an abused juvenile as defined by N.C. Gen. Stat. § 7B-101(1)(b). *See In re F.C.D.*, 244 N.C. App. at 246 780 S.E.2d at 217; N.C. Gen. Stat. § 7B-101(1)(b).

¶ 39 Both Respondents maintain that there was no witness testimony to support a finding that the injuries were non-accidental. We find Respondents' arguments that witness testimony is *required* to support a finding that an injury is "non-accidental" are without merit. Respondents point to no cases to support their contentions that medical testimony or other witness testimony is required to prove under N.C. Gen. Stat. § 7B-101(1) an injury is "by other than accidental means." We note in the instant case, there is no witness testimony, or any other direct evidence for that matter, that the juvenile was burned through "non-accidental" means. Again, the trial court's conclusion is supported by sufficient, binding findings, which in turn support the inference the injuries were non-accidental.

¶ 40 Next, Respondents both argue that the lack of supervision of a juvenile falls under the statutory definition of neglect, not abuse. *In re K.B.*, our Court considered this argument when a trial court found a juvenile's parents failed to properly provide the juvenile with his prescribed medications used to treat his mental health and behavioral issues and adjudicated the minor abused, neglected, and dependent. 253 N.C. App. 423, 428, 801 S.E.2d 160, 164 (2017). The trial court also found the parents did not properly supervise the special-needs juvenile to ensure he would not hurt himself. *Id.* at 435, 801 S.E.2d at 167–68. We upheld the trial court's adjudications and held the respondents created a substantial risk of physical injury by other than accidental means by failing to provide the juvenile's medication and by failing to provide adequate supervision of their child; therefore, the trial court's findings supported the conclusion that the juvenile was abused. *Id.* at 435, 801 S.E.2d at 168.

¶ 41 Similar to *In re K.B.*, in the case *sub judice*, the trial court made multiple findings, including findings of fact 31, 35, 38, and 45, to support the conclusion Respondents created a substantial risk of physical injury for their young juvenile children by allowing them to be left unsupervised. *See id.*, 253 N.C. App. at 434–35, 801 S.E.2d at 167–68. The findings show Respondent-Mother knew of the paternal grandmother's unstable behavior, which necessitated medication, and the substantial risk of physical injury her volatile conduct posed to the children. *See In re M.G.*,187 N.C. App. at 549, 653 S.E.2d at 589; *In re L.C.*, 253 N.C. App. 67, 72, 800 S.E.2d 82, 87 (2017) (stating a respondent mother's *knowledge* of her child's previous abuse in her home would support a conclusion that the parent allowed a substantial risk of serious injury to the child to be created by allowing the perpetrator to remain in the home). Despite this risk, Respondent-Mother allowed the paternal grandmother to continue to care for her children, and she failed to take

steps to ensure her children were properly supervised and protected. *See In re M.G.*,187 N.C. App. at 549, 653 S.E.2d at 589. The unchallenged findings of fact 32, 33, and 39 establish the paternal grandmother pointed a gun and threatened Respondent-Mother while in the close presence of Wes when he was an infant due to the paternal grandmother failing to take her medication; the paternal grandmother was verbally abusive to Respondent-Mother when she did not take her medication; and, on the day of the injury, the paternal grandmother left the small children alone in the home and later called Respondent-Mother's manager at work to call Respondent-Mother names, and to threaten "someone w[ould] take care of [Respondent-Mother's] kids for her" if she did not. Therefore, we hold the trial court's adjudication of abuse is supported by findings of fact, which are in turn deemed supported by clear and convincing evidence. *See In re F.C.D.*, 244 N.C. App. at 246 780 S.E.2d at 217.

B. Adjudication of Dependency

¶ 42 **[2]** Respondent-Mother argues that there was no evidence in the record or findings of fact made by the trial court to demonstrate her inability to care for the children. Similarly, Respondent-Father contends the trial court did not find he or Respondent-Mother was unable to care for their children. We disagree.

¶ 43 The Juvenile Code defines a "dependent juvenile" as a

> [j]uvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-101(9) (2019). The trial court is required to make findings of facts that address both prongs of N.C. Gen. Stat. § 7B-101(9): (1) the parent's inability to provide care or supervision; and (2) the unavailability to the parent of alternative child care arrangements before a juvenile may be adjudicated as dependent. *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). A juvenile may not be adjudicated dependent so long as at least one parent is capable of providing or arranging for adequate care and supervision of the child. *In re V.B.*, 239 N.C. App. 340, 342, 768 S.E.2d 867, 868 (2015).

¶ 44 "[T]he purpose of an adjudicatory hearing [for a dependency proceeding] is to determine only 'the existence or nonexistence of any of

the conditions alleged in a petition.' " *In re V.B.*, 239 N.C. App. at 344, 768 S.E.2d at 869–70 (quoting N.C. Gen. Stat. § 7B-802).

¶ 45 Here, the trial court made the following uncontested findings of fact pertinent to the children's dependency adjudication:

> 45. The lack of supervision of these juveniles led to [Wade] sustaining his injuries.
>
> . . . .
>
> 80. ACDSS was not allowed to enter into the respondent parent's home before the petition was filed even though the juveniles were not placed at that residence. ACDSS attempted at least six (6) home visits with the respondent parents before the petition was filed. ACDSS was unable to follow up with an in-home review (before the petition was filed) to see if any concerns had been corrected.
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> . . . .
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> 82. On July 21, 2020 [the maternal grandmother] told ACDSS social workers that she was overwhelmed with all three juveniles, that she had "backhanded" [Wren] because [Wren] split in [her] face, and that she was frustrated with the respondent parents being late to their visits. ACDSS immediately removed the juveniles from the [maternal grandparents] home and began finding another placement.
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> . . . .
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> 86. Between July 21, 2020 and August 21, 2020, ACDSS inquired of the respondent parents for an alternative plan of care for the juveniles. The respondent parents were able to give two names to SWS Baldwin for the vetting process. ACDSS received lots of calls and emails from random individuals inquiring about caring for the juveniles during this time period. ACDSS would not discuss the care of the juveniles on these calls and emails due to confidentiality. ACDSS followed up with the respondent parents by asking them repeatedly to not have random people call

ACDSS, but rather just submit their proposed caregivers to SW Chaney and SWS Baldwin.

87. Of the two names that were given to ACDSS by the respondent parents, one person was determined to work at ACDSS (but not in the CPS unit) and was thus ineligible. The second person called ACDSS and left a voicemail stating that he was a neighbor of the respondent parents and was approached randomly by the respondent father and asked to care for the juveniles. He indicated that he was not able to care for the juveniles.

88. This failure to make an appropriate plan of care for the juveniles led to the filing of the petitions on August 21, 2020.

89. [Wes] did not see a primary care pediatrician . . . from 7 months until he was 32 months old. He also went from age 32 months until age 5 years old without seeing a primary care pediatrician. In his medical records, there were notes about developmental delays (including severe delayed speech) and a concern about possible autism and services were recommended to the parents, but they were discontinued due to multiple missed appointments. [Wes] failed a hearing test at age 5, but passed a hearing test at age 6. The respondent parents have not attended to [Wes's] developmental and medical needs as necessary.

. . . .

91. Although [Wes] had developmental delays, the respondent parents did not enroll him in public kindergarten. They also did not have an established home school structure in place for [Wes]. The respondent parents have not attended to [Wes's] educational needs as necessary.

. . . .

93. Although respondent mother had concerns with [Wren's] behaviors at her 12-month well child checkup, respondent mother did not attend a

> parent educator appointment nor did [Wren] attend her 15-month well child appointment. The respondent parents brought up [Wren's] challenging behaviors (and specifically repeated attempts to hurt other people) at [Wade's] one-month well baby check on January 17, 2020 but cancelled her 18-month appointment three times in the month of February and rescheduled when she was 20 months old (March 30, 2020). The respondent parents had allowed [Wren's] Medicaid coverage to lapse. The respondent parents have not attended to [Wren's medical needs as necessary.
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> . . . .
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> 100. Dr. Esther Smith, MD indicated that [Wade's] sleeping environment was unsafe in that it was in close proximity to a heat source, there were excessive blankets creating a suffocation risk, and a fall risk due to an improperly assembled rocking cradle.
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> . . . .
>
> 103. That the juveniles' parents and/or caretaker did not provide appropriate care or supervision for the juveniles and created an injurious environment placing the juveniles at substantial risk of harm.
>
> 104. The juveniles' parents and/or caretaker did not have an appropriate, alternative plan of care.

¶ 46 In this case, ACDSS filed its petitions on 21 August 2021 alleging all three children were dependent. Prior to the petitions being filed, ACDSS gave Respondents the opportunity to provide an alternative kinship placement because the placement with the neighbors of the maternal grandparents was scheduled to end on 21 August 2021. When Respondents could not provide another placement, ACDSS sought non-secure custody. ACDSS also gave Respondents the opportunity to address the agency's concerns with their home; however, Respondents failed to allow ACDSS to perform an in-home review to assess the changes and refused ACDSS into their home on more than six occasions. Based on the findings of fact, the trial court concluded as a matter of law that Wade, Wren, and Wes were dependent juveniles under N.C. Gen. Stat. § 7B-101(9).

¶ 47 The above findings of fact related to the juveniles' dependency were not challenged by Respondents; thus, the findings are binding on appeal. *See In re J.M.W.*, 179 N.C. at 792, 635 S.E.2d at 919. The findings of fact establish: (1) Respondents' lack of care and supervision over the children led to Wade's injury; (2) Respondents were unable to provide ACDSS with an alternative plan of care for the children after the temporary placement with the maternal grandparents' neighbors ended; (3) Respondents failed to meet Wes' educational needs; and (4) Respondents failed to meet the children's medical needs. We hold the findings of fact are sufficient to support a conclusion that Respondents were "unable to provide for the juvenile[s'] care or supervision and lack[ed] an appropriate alternative child care arrangement." *See* N.C. Gen. Stat. § 7B-101(9).

V. Disposition

A. Steps toward Reunification

¶ 48 **[3]** The North Carolina General Statutes grants a trial judge the authority to order a parent at a dispositional hearing to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent . . . ." N.C. Gen. Stat. § 7B-904(d1)(3) (2019). "For a court to properly exercise the authority permitted by [Section 7B-904(d1)], there must be a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication." *In re T.N.G.*, 244 N.C. App. 398, 408, 781 S.E.2d 93, 101 (2015) (citation omitted).

¶ 49 In this case, the trial court ordered Respondent-Mother to take part in certain activities which it found were reasonably related to the reasons for the juveniles' removal and were aimed at achieving the plan of reunification. Respondent-Mother challenges portions of the following steps imposed by the trial court:

> 1. The mother is to provide proof of a sufficient source of income to support herself and her children and use funds to meet basic needs. She can work to achieve this goal by providing income receipts and a budget to the [social worker].
> 2. That the mother will refrain from allowing mental health to impact parenting and provide a safe, appropriate home by not exposing her children to injurious environment. In order to achieve this goal, the mother will obtain and follow the recommendations of a mental health assessment

> and psychological evaluation. The mother will also participate in domestic violence assessment and participate in all recommended services.

¶ 50 Respondent-Mother first argues that her "only 'fault' [is] she was working many hours to provide financially for her family and left her children in the care of their grandmother;" thus, the requirement to show proof of income is unnecessary. We disagree.

¶ 51 Here, the trial court found a condition that led to the children's adjudication was lack of care and supervision. In response, the court ordered Respondent-Mother to show proof of income. This requirement is reasonably related to ensuring the children have adequate care and supervision and to addressing the risk factors identified by ACDSS, including to ensure a safe home environment. *See In re A.R.*, 227 N.C. App. 518, 522, 742 S.E.2d 629, 623–33 (2013) (holding proof of income was reasonably related to remedying the condition of domestic violence, which led to children's removal from their parents' home).

¶ 52 Next, Respondent-Mother argues there is no evidence in the record that she suffered from mental illness; therefore, the provision that Respondent-Mother "refrain from allowing mental health to impact [her] parenting" bears no relationship to her children's removal from her home. We disagree. Again, the trial court's findings that Respondent-Mother had conspired with Respondent-Father and the paternal grandmother "to develop a completely false narrative" about Wade's injuries and that Respondent-Mother "promulgated [a] false narrative" about her toddler child being at fault for Wade's burns support the trial court's mandate. Additionally, physicians and social workers had reason to suspect domestic violence occurred in Respondents' home but "could never get mom alone" and the social workers were never able to complete their in-home review before the adjudication petitions were filed. The trial court's decree is reasonably related to ensuring the children's safety and proper supervision.

¶ 53 We hold the trial court's order that Respondent-Mother show proof of income and "refrain from allowing mental health to impact parenting" are "appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication." *See* N.C. Gen. Stat. § 7B-904(d1)(3).

B. Visitation

¶ 54 **[4]** Respondent-Mother contends the trial court abused its discretion by limiting Respondent-Mother's visitation with her children to one-hour

of highly supervised weekly visits because "[t]here is absolutely zero evidence in the record that [Respondent-Mother] presented any kind of threat to harm her children." We disagree.

¶ 55 "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) (citation omitted).

¶ 56 N.C. Gen. Stat. § 7B-905.1 provides:

> [a]n order that removes custody of a juvenile from a parent . . . or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation.

N.C. Gen. Stat. § 7B-905.1(a) (2019).

¶ 57 Here, the trial court addressed Respondent-Mother's visitation with her children in its dispositional order and granted the following plan:

> [Respondent-Mother] shall have visitation on Fridays from 11 a.m. until 12 p.m. which is consistent with the juveniles' health and safety. That the level of supervision shall include high—eyes and ears on, direct supervision. The parties may mutually agree to additional visitation with the same level of supervision or to change the location of visitation.

¶ 58 Respondent-Mother relies on the trial court's finding that the visits with her children while they were placed with the neighbor of the maternal grandmother were "normal" and "loving" to argue her visitation should not have changed from four hours per day to once per week after the children were placed in a foster home. However, Respondents were aware that the neighbors could act only as a temporary placement until 21 July 2020. Respondents failed to provide ACDSS with the name of an appropriate alternative placement before the placement with the neighbors ended. Accordingly, ACDSS filed petitions and sought nonsecure custody of the children. ACDSS placed the children with a foster family in Moore County, an approximate one-and-a-half-hour drive from Respondents' home, so that all three children could be placed together. Respondent-Mother fails to cite to any case in which this Court held that a limitation on visitation to once per week was an abuse of discretion after a juvenile had been placed in foster care. The highly supervised, one-hour weekly visits with Respondents is consistent with the 4 November 2020 recommendation of the guardian *ad litem* as well as

ACDSS's recommendations in its 18 November 2020 dispositional court report. Additionally, the trial court's order allows the option for the foster family and Respondents to agree to additional visitation time. Therefore, the trial court had a reasonable basis for limiting Respondent-Mother's visitation with the children to one-hour, weekly visits.

C. Constitutional Right to Parent

¶ 59 **[5]** "The standard of review for alleged violations of constitutional rights is *de novo*." *In re L.C.*, 253 N.C. App. 67, 72, 800 S.E.2d 82, 87 (2017) (citation omitted). "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted).

¶ 60 "This Court has held that where a parent is on notice that guardianship with a third party has been recommended and will be determined at the hearing, if the parent fails to raise this argument at the hearing, appellate review of the constitutional issues is waived." *In re S.R.J.T.*, 2021-NCCOA-94 ¶ 17. In order for waiver to occur, the parent must have been afforded the opportunity to object or raise the argument at the hearing. *In re R.P.*, 252 N.C. App. 301, 305, 798 S.E.2d 428, 431 (2017); *see In re C.P.*, 258 N.C. App. 241, 246, 812 S.E.2d 188, 192 (2018) (holding waiver occurred where a respondent did not "argue[ ] to the court or otherwise raise[ ] the issue that guardianship would be an inappropriate disposition *on a constitutional basis*.") (emphasis added).

¶ 61 In this case, Respondent-Mother's counsel was on notice that guardianship of the children was recommended, and she had an opportunity to be heard at the dispositional hearing on the issue. In response, counsel stated at the hearing that Respondent-Mother would "of course . . . like to have custody of the children, and it's her position that she could handle that. We would like to ask for expanded visitation, and that has been offered." Counsel for Respondent-Mother also argued to the trial court at the dispositional hearing that the allegations against Respondents related to abuse, neglect, and dependency be dismissed and the children be returned to Respondents' home. At no point during the hearing did Respondent-Mother or Respondent-Mother's counsel raise the issue of Respondent-Mother's constitutional rights afforded to her as a parent. Therefore, we hold Respondent-Mother waived her right to raise the constitutional argument on appeal. *See In re T.P.*, 217 N.C. App. 181, 186, 718 S.E.2d 716, 719 (2011) (holding the respondent mother waived review of the issue of whether she acted in a manner inconsistent with her constitutionally protect status as a parent because she failed to object at trial).

VI. Conclusion

¶ 62 We affirm the trial court's adjudication of Wade as an abused, neglected, and dependent juvenile and its adjudication of Wes and Wren as neglected and dependent juveniles. We hold the trial court did not err in mandating Respondent-Mother to show proof of income and "to refrain from allowing mental health to impact parenting" as appropriate steps to remedy the conditions in the Respondents' home that led to the juveniles' adjudications. We affirm the trial court's visitation plan in the disposition order. Finally, we hold Respondent-Mother waived her constitutional argument as to the trial court's conclusion that she acted in a manner inconsistent with her status as a parent.

AFFIRMED.

Judges DILLON and INMAN concur.

MARY LEARY, BY AND THROUGH HER POWER OF ATTORNEY WILLIAM LEARY; WILLIAM LEARY, AND ROBERT MCCLINTON, PLAINTIFFS
v.
RITA ANDERSON AND GOKAM PROPERTIES LLC, DEFENDANTS

No. COA21-230

Filed 19 October 2021

Real Property—sale of home on behalf of incompetent woman—validity of multiple powers of attorney—genuine issues of material fact

In an action brought on behalf of an elderly woman to contest the sale of her home by her daughter, the trial court erred by granting summary judgment in favor of the home's buyer and in cancelling plaintiffs' notice of lis pendens, where genuine issues of material fact existed regarding the validity and scope of powers of attorney (POAs) purportedly held by the daughter and by one of the woman's sons, including whether either POA was durable, and whether any of the parties had authority to act on behalf of the woman after she was declared partially incompetent in a special proceeding before a clerk of court.

Appeal by plaintiffs from order entered 7 October 2020 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 7 September 2021.

Justice in Action Law Center, by Alesha S. Brown, for plaintiffs-appellants.

Offit Kurman, P.A., by Robert B. McNeill and Alexandra M. Edge, for defendant-appellee Gokam Properties LLC.

TYSON, Judge.

¶ 1 Mary Leary, by and through her attorney-in-fact William Leary, with William Leary and Robert McClinton, individually (together, "Plaintiffs"), appeal from a superior court's order granting summary judgment in favor of Gokam Properties, LLC" ("Gokam Properties") regarding its acquisition of property from Rita Anderson ("Anderson") under a power of attorney, (together, "Defendants"). The superior court granted summary judgment and dismissed all claims against Gokam Properties and dismissed Plaintiffs' *lis pendens*. Plaintiffs timely appealed.

I. Background

A. The Home

¶ 2 Mary Leary (Mrs. Leary) and Will Leary purchased property located at 1418 Russell Avenue, Charlotte, North Carolina ("the home") as tenants by the entirety in June 1963. Will Leary died in 2001, and Mrs. Leary acquired full title to the home by right to survivorship. Mrs. Leary continued to occupy the home as the sole owner until January 2017. Gokam Properties acquired the home on 20 September 2019 from Anderson under acting as Mrs. Leary's limited power of attorney to sell real estate.

B. Rita Anderson's Purported Durable Power of Attorney

¶ 3 Mrs. Leary was 87 years old in January 2017 when this case arose. Rita Anderson moved her mother, Mrs. Leary, into her own home in January 2017. Mrs. Leary purportedly executed a durable power of attorney ("DPA") before a notary on 11 January 2017 for Anderson. The purported DPA appointed Anderson as Mrs. Leary's agent and empowered Anderson to act on behalf of her mother.

¶ 4 The purported DPA was not filed with the Mecklenburg County Register of Deeds until 21 October 2019, roughly one month after Mrs. Leary's home was conveyed to Gokam Properties on 20 September 2019 and 11 days after this lawsuit was filed.

C. Mary Leary's Capacity

¶ 5 On 12 January 2017, Anderson accompanied Mrs. Leary, who presented for a doctor's visit with Michelle L. Foster, M.D. The medical

records specifically state, "her [Mrs. Leary's] daughter [Anderson] is seeking power of attorney and guardianship asthma (sic) some areas no longer able to make informed decisions," and "[t]oday I did advise her daughter that she cannot stand alone and I do suggest that she obtain power of attorney to handle all of her affairs." Dr. Foster further wrote "I am asking that her daughter (Rita Leary Anderson) assume power of attorney for Ms. Leary."

¶ 6 Dr. Foster stated the following concerning Mrs. Leary's condition: (1) "past medical history significant for coronary artery disease, hypertension, hyperlipidemia, increase in memory loss and some mild dementia as well as worsening weakness and weight loss;" (2) "[s]he also has had worsening vision and increasing memory loss and worsening dementia;" (3) "[s]he still has limited judgment and insight secondary to her mild dementia;" (4) "Dementia: Appears to be worsening;" and (5) "Mary Leary is under my care for multiple medical problems including dementia, anemia, hypertension and increasing cognitive difficulty secondary to dementia."

¶ 7 William Leary recorded a general power of attorney ("POA") from Mrs. Leary giving him authority to conduct real property transactions, estate transactions and other responsibilities less than five months later on 7 May 2017. William Leary avers in his sworn affidavit he was granted a DPA at that time.

D. Incompetency Hearing

¶ 8 A hearing was held in a special proceeding, *In the Matter of Mary Alice Wilson Leary* before the clerk of superior court in file number 18-SP-1559, to determine Mrs. Leary's competency and her ability to function on her own on 8 June 2018. Mrs. Leary was 89 years old by the time of the hearing.

¶ 9 During the 8 June 2018 hearing, the guardian *ad litem* ("GAL"), Attorney Fatina Lorick, issued a report, which noted:

> I spoke with Respondent about her home, and the fact that her sons lived in the home. Respondent expressed a desire to allow them to remain in her home. She also emphasized th[at] she took pride in her home, and that she and her late husband worked hard to obtain and maintain her home.
>
> . . . .

> Based upon my investigations, I believe that it is in (sic) [Mrs. Leary] has some competency but requires assistance. I have concerns regarding the validity of [Anderson's] Power of Attorney and whether or (sic) [Mrs. Leary] had an adequate level of competency when she executed the document.

¶ 10 At the June 2018 hearing, the court found Mrs. Leary was "incompetent to a limited extent" and could "understand[] conversation and communicate[] personal needs," "make and communicate decisions about residential options," "demonstrates willingness to vote and can acquire information accordingly," as well as had capacity to determine her social and religious involvement. The court ordered Mrs. Leary had "final say for her living arrangements." Mrs. Leary as declared incompetent to make legal decisions or to execute legal documents at that hearing, and "if M. Anderson [was]unable to be bonded and qualify within 90 days of this order, atty (sic) to be appointed GOE [Guardian of the Estate]." Anderson failed to qualify as Mrs. Leary's guardian.

E. Selling the Home

¶ 11 Over a year later, Anderson signed Mrs. Leary's name on a Limited Power of Attorney to Sell Real Estate on 6 September 2019. Based upon this purported Limited Power of Attorney to Sell Real Estate Mrs. Leary's home was sold and deeded to Gokam Properties on 20 September 2019.

¶ 12 Anderson knew Plaintiffs were residing in their mother's home, but Anderson did not tell Plaintiffs of the sale until 23 September 2019. Anderson purportedly told an agent of Gokam Properties not to notify Plaintiffs of the sale until after it was completed. A representative of Gokam Properties met William Leary and Robert McClinton at the home and offered each of them $300.00 if they would move out in two days.

¶ 13 Anderson did not place the proceeds of sale into an account for the benefit of Mrs. Leary. Instead, she contacted her brother, Robert McClinton to divide the proceeds between them, offering him $20,000.00 and she would keep the remaining $75,000.00 in proceeds.

F. Trial Court Proceedings

¶ 14 Plaintiffs filed this instant lawsuit on 10 October 2019 to challenge the conveyance of the home. Defendants subsequently answered. On 9 December 2019, a hearing was held in 18-SP-1559 to modify Mrs. Leary's guardianship. In the GAL Report issued again by Attorney Fatina Lorick, it is reported Mrs. Leary did not want to sell her home and wanted to know if Attorney Lorick could help her get her home back.

¶ 15 Attorney Lorick noted:

> I was able to speak with [Mrs. Leary] who is now at Mecklenburg County Rehabilitation Center ("Center"). [Mrs. Leary] informed me that she was there at the Center because she has no other place to go due to her home being sold by [Anderson]. She also asked me if there were any way for me to try to get her house back. She let me know that she recently moved into the Center and that none of her family was aware that she was at the center.
>
> . . . .
>
> Given [Anderson's] unwillingness to meet with me and provide information to me, I have concerns regarding her ability and fitness to remain guardian. It was only after I threated to to (sic) use law enforcement that she disclosed to me [Mrs. Leary's] location. In my communication with other family members, [Anderson] did not inform the rest of the family she [had] placed [Mrs. Leary] in the Center. Pursuant to the Order of the Court, [Anderson] is not qualified to assume general guardianship.

¶ 16 In an order dated 9 December 2019 in *In the Matter of Mary Alice Wilson Leary*, 18-SP-1559, the court found "Ms. Anderson failed to qualify as General Guardian/Guardian of Person (GOP) & failed to stop the sale of [Mrs. Leary's] property. Court shall appoint Guardian of Estate."

¶ 17 Anderson filed her purported 11 January 2017 DPA with the Mecklenburg County Register of Deeds on 21 October 2019. Gokam Properties contend summary judgment is proper because it purchased Mrs. Leary's home through the holder of a DPA. The trial court entered summary judgment for Gokam Properties. Plaintiffs appeal.

II. Jurisdiction

¶ 18 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019).

III. Issues

¶ 19 Two issues are presented on appeal: (1) whether the trial court erroneously granted Gokam Properties' motion for summary judgment; and, (2) whether the trial court erroneously cancelled the filed *lis pendens*.

IV. Standard of Review

¶ 20 This Court reviews a summary judgment order *de novo*. *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 410, 618 S.E.2d 858, 860 (2005). Summary judgment is proper only when the "pleadings, together with depositions, interrogatories, admissions on file, and supporting affidavits show that no genuine issue of material fact exists between the parties with respect to the controversy being litigated and the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted).

¶ 21 The movant bears the burden of establishing "there is no triable issue of material fact [by] proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Davis v. Cumberland Cnty. Bd. of Educ.*, 217 N.C. App. 582, 585, 720 S.E.2d 418, 420 (2011) (citations omitted).

¶ 22 "[A]ll inferences of fact must be drawn against the movant and in favor of the nonmovant." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 682, 565 S.E.2d 140, 146 (2002) (citation omitted).

V. Argument

¶ 23 Plaintiffs argue summary judgment is improper because several genuine issues of material fact exist: (1) whether William Leary has standing; (2) whether an incompetent person's property was sold by a purported guardian without court approval; (3) whether Anderson, acting as a guardian, followed the required special proceedings to sell the home and whether she wrongfully retained the proceeds; and, (4) whether Anderson's DPA or Limited POA were sufficient to sell the home.

A. William Leary's Standing

¶ 24 Gokam Properties argues there is no genuine dispute of material fact of the termination of William Leary's May 2017 POA upon Mrs. Leary's adjudication of incapacity. The record shows Mrs. Leary appointed William Leary as her attorney-in-fact on 7 May 2017. William Leary's affidavit asserts, "I was granted Durable Power of Attorney on May 7, 2017, which was prior to my mother being declared incompetent in June 2018." Gokam Properties argues the William Leary POA, even if valid, was terminated when Mrs. Leary became incompetent because such power of attorney was not "durable."

¶ 25 A POA/DPA created prior to 1 January 2018 is governed by N.C. Gen. Stat. § 32A-2 (2017). *See* N.C. Gen. Stat. § 32C-1-106(b) (2019). Pursuant to the now-repealed N.C. Gen. Stat. § 32A-8, a POA is "durable" if it was

made in writing and either contained: (1) "a statement that it was executed pursuant to the provisions" of Chapter 32A; (2) the words "[t]his power of attorney shall not be affected by my subsequent incapacity or mental incompetence;" (3) the words "[t]his power of attorney shall become effective after I become incapacitated or mentally incompetent;" or, (4) similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity or mental incompetence.

¶ 26 Gokam Properties argue William Leary's POA is merely a statutory short form of a general POA pursuant to N.C. Gen. Stat. 32A-1. Gokam Properties assert as a non-durable POA, William Leary's POA was terminated upon the court's adjudication of Mrs. Leary as incompetent on 8 June 2018. *See* N.C. Gen. Stat. § 32C-1-110 (2019) (power of attorney terminates if the power of attorney is not durable and the principal becomes incapacitated).

¶ 27 Plaintiffs argue they have standing to bring this lawsuit pursuant to our Supreme Court precedent in *In re Lancaster*, 290 N.C. 410, 226 S.E.2d 371 (1976). In *In re Lancaster*, Ms. Lancaster was declared incompetent and, as in this case, her attorney and her heir were presumed to have acted for their own financial interest and gain, and not in the best interest of the ward. *Id.* at 415, 226 S.E.2d at 375. The attorney filed an application on the ward's behalf to have a guardian appointed and to stop the sale of the ward's land. *Id.* at 416, 226 S.E.2d at 376. This Court affirmed the trial court's determination the attorney and the heir did not have standing to bring the action on behalf of the incompetent woman. *Id.* at 420, 226 S.E.2d at 378. In response, the Supreme Court of North Carolina remanded and held:

> Ordinarily the one who acts on behalf of an incompetent is his guardian, trustee, or guardian *ad litem* and the incompetent, being under a disability, is not accorded "standing." But where the complaint is that the guardian himself is acting either wickedly, incompetently or in ignorance of the facts, the concept of "standing" must necessarily give way to the primary duty of the court itself as the ultimate guardian to protect the incompetent's interest. In the performance of this duty the court must receive, and should welcome, any pertinent information or assistance from any source. . . . "While . . . [an incompetent] must be represented, in all judicial proceedings, by the guardian, it is entirely proper, *either in his own*

> *person or through any friend*, for him to call attention to any matter then pending and under the control of the court, to the end that it may be investigated and his rights protected."

Id. at 424–25, 226 S.E.2d at 380 (emphasis original) (citations omitted).

¶ 28 Here, it is not disputed that on 7 May 2017, before Mrs. Leary was adjudicated incompetent, she signed a general POA before a notary appointing William Leary as her attorney-in-fact and giving him broad authority over her finances and real property. This POA was properly recorded prior to any other POA executed by Mrs. Leary. It is disputed if a guardian or holder of a DPA acted on actual authority and on behalf of Mrs. Leary's best interest and for her benefit when her home was sold. It is also disputed if Anderson acted under valid authority or for her own personal interest. In *In re Lancaster*, the ward's attorney was given standing to bring the lawsuit and the court "must receive, and should welcome, any pertinent information or assistance from any source." *Id.* at 425, 226 S.E.2d at 380.

¶ 29 A genuine issue of material fact exists to determine whether Plaintiffs have standing. Although Anderson may initially have served as Mrs. Leary's *de facto* guardian, she failed to qualify to serve as guardian, leaving Mrs. Leary with no legal guardian. Even if we were to presume Anderson was serving as guardian, viewing the evidence in the light most favorable to Plaintiffs, an issue of fact exists whether Anderson was "acting either wickedly, incompetently or in ignorance of the facts" in the sale of the home with knowledge of Mrs. Leary's status and pending special proceeding to deny summary judgment in favor of Gokam Properties. *Id.* at 424, 226 S.E.2d at 380.

B. Court Appointed Guardian

¶ 30 Plaintiffs also argue summary judgment is improper because Mrs. Leary's DPA and guardianship is disputed, and the home could only be sold by her court appointed guardian. Our Supreme Court has held the sale of property by "one who is not [a person deemed incompetent's] duly appointed and duly qualified guardian is void." *Buncombe County v. Cain*, 210 N.C. 766, 775, 188 S.E. 399, 404 (1936). The Court further held the purchaser of the incompetent person's property "has sustained no damages by reason of the sale and conveyance, and therefore cannot recover on the official bond of the clerk of the Superior Court[.]" *Id.*

¶ 31 It is undisputed Mrs. Leary was declared incompetent on 8 June 2018 to make legal decisions or to execute legal documents. The trial

court held Mrs. Leary was declared "incompetent to a limited extent" and ordered she could not "communicate wishes regarding legal documents or services on her own."

¶ 32 The record is unclear whether Anderson was Mrs. Leary's "duly appointed and duly qualified guardian" at the time of the 8 June 2018 hearing. In the 8 June 2018 Order, the trial court directed "if M. Anderson [was] unable to be bonded and qualify within 90 days of this order, Atty to be appointed G.O.E. [Guardian of Estate]." In the subsequent order dated 9 December 2019 in the same matter, the court found "Ms. Anderson failed to qualify as General Guardian/Guardian of Person (GOP) & failed to stop the sale of [Mrs. Leary's] property. Court shall appoint Guardian of Estate (GOE)."

¶ 33 If Anderson did not possess legal authority to sell Mrs. Leary's home, the sale is void. *Buncombe County*, 210 N.C. at 775, 188 S.E. at 404. If the sale of Mrs. Leary's home is void, Plaintiff's claims against Gokam Properties should not have been adjudicated on summary judgment. At minimum, the award of guardianship and timing and recording of relevant forms is in dispute. Summary judgment for Gokam Properties was improper.

C. Special Proceeding

¶ 34 Plaintiffs also argue the sale of Mrs. Leary's home is invalid and void as a matter of law because a special proceeding hearing was not held to approve the sale.

> (b) A guardian may apply to the clerk, by verified petition setting forth the facts, to sell, mortgage, exchange, or lease for a term of more than three years, any part of his ward's real estate, and such proceeding shall be conducted as in other cases of special proceedings. The clerk, in his discretion, may direct that the next of kin or presumptive heirs of the ward be made parties to such proceeding. The clerk may order a sale, mortgage, exchange, or lease to be made by the guardian in such way and on such terms as may be most advantageous to the interest of the ward, upon finding by satisfactory proof [of one to five elements]
>
> . . . .
>
> (d) All petitions filed under this section wherein an order is sought for the sale, mortgage, exchange, or

> lease of the ward's real estate shall be filed in the county in which all or any part of the real estate is situated.

N.C. Gen. Stat. § 35A-1301(b), (d) (2019).

¶ 35 A "ward's estate is very carefully regulated, and the sale [of real property] is not allowed except by order of court[.]" *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 11, 161 S.E.2d 453, 462 (1968). Our Supreme Court has long held that "a contract by a guardian to sell the ward's real estate, in advance of legal authority, is contrary to public policy and void." *LeRoy v. Jacobosky*, 136 N.C. 443, 456, 48 S.E. 796, 800 (1904) (citations omitted).

¶ 36 Mrs. Leary was adjudicated incompetent in June 2018. Anderson sold Mrs. Leary's home without an order of the court authorizing the sale on 20 September 2019. A genuine dispute exists regarding Anderson's authority to sell Mrs. Leary's home. Summary judgment for Gokam Properties was improper.

D. Anderson's Purported DPA

¶ 37 Plaintiffs argue the trial court erred in finding the January 2017 purported DPA to Anderson is valid. During the hearing on summary judgment, the court questioned whether a pre-existing POA survives an incompetency proceeding and allowed the parties to submit supplemental briefing on that narrow issue.

¶ 38 Plaintiffs further argue even if the issue is relevant, summary judgment was not proper because: (1) an agent established by a DPA is still required to obtain court approval prior to selling the home of an individual declared incompetent by a court pursuant to N.C. Gen. Stat. § 35A-1301(b); (2) there is an issue of fact regarding whether a valid DPA existed prior to Mrs. Leary's declaration of incompetence; and, (3) if the 11 January 2017 DPA existed, there is an issue of fact regarding Mrs. Leary's capacity to grant a DPA in 2017.

1. Valid POA/DPA

¶ 39 Our General Statutes provide: "If, after a principal executes a power of attorney, the clerk of superior court appoints a guardian . . . the agent is accountable to the guardian or the fiduciary as well as to the principal. N.C. Gen. Stat. § 32C-l-108(b) (2019).

¶ 40 In June 2018, the court declared Mrs. Leary partially incompetent concerning legal documents and decisions. The court ordered a general guardian be appointed and gave Anderson the opportunity to qualify and

serve as Mrs. Leary's guardian if she qualified within 90 days. Anderson filed the purported DPA with the register of deeds more than a year later on 21 October 2019. On 9 December 2019, the court found and concluded "Ms. Anderson failed to qualify as General Guardian/Guardian of Person (GOP) & failed to stop the sale of Ward's property."

¶ 41 Plaintiffs argue Anderson failed to qualify as Mrs. Leary's guardian, and any alleged pre-existing DPA could not be used to convey Mrs. Leary's home until a guardian was appointed by the court and an order of sale had been entered. Mrs. Leary had been declared incompetent and an attorney-in-fact under a DPA is accountable to the court appointed guardian, as well as their principal, for the sale and the accounting of any proceeds therefrom. N.C. Gen. Stat. § 32C-1-108(b)(2019).

2. Disputed January 2017 DPA

¶ 42 Plaintiff argues summary judgment was improper because a material issue of fact exists pertaining to the validity of Anderson's January 2017 DPA.

¶ 43 "A power of attorney executed in this State before January 1, 2018, the effective date of this Chapter is valid if its execution complied with the law of this State as it existed at the time of execution." N.C. Gen. Stat. § 32C-1-106. When the purported DPA was created, the North Carolina statutes provided:

> A durable power of attorney is a power of attorney by which a principal designates another his attorney-in-fact in writing and the writing contains a statement that it is executed pursuant to the provisions of this Article or the words "This power of attorney shall not be affected by my subsequent incapacity or mental incompetence," or . . . similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity or mental incompetence.

N.C. Gen. Stat. § 32A-8 (2017) (repealed by Session Law 2017-153, s. 2.8). The current statute governing the validity of DPAs, provides "[a] power of attorney created pursuant to this Chapter is durable unless the instrument expressly provides that it is terminated by the incapacity of the principal." N.C. Gen. Stat. § 32C-1-104 (2019). N.C. Gen. Stat. § 32C-1-105 (2019) provides:

> A power of attorney must be (i) signed by the principal or in the principal's conscious presence by

> another individual directed by the principal to sign the principal's name on the power of attorney and (ii) acknowledged. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgements.

¶ 44 "[W]hen a mentally incompetent person executes a contract or deed before their condition has been formally declared, the resulting agreement or transaction is voidable. *O'Neal v. O'Neal*, 254 N.C. App. 309, 314, 803 S.E.2d 184, 188 (2017). Further, "a contract or deed executed after a person has been adjudicated incompetent is absolutely void absent proof that the person's mental capacity was restored prior to executing the instrument. *Id.* at 314–15, 803 S.E.2d at 188–89.

¶ 45 Here, the medical records from Mrs. Leary's 12 January 2017 visit with Dr. Foster stated Anderson was working to secure a power of attorney but had not done so as of that date. The medical records state, "her daughter is seeking power of attorney and guardianship asthma (sic) some areas no longer able to make informed decisions," and "[t]oday I did advise her daughter that she cannot stand alone and I do suggest that she obtain power of attorney to handle all of her affairs." Dr. Foster wrote "I am asking that her daughter (Rita Leary Anderson) assume power of attorney for Ms. Leary."

¶ 46 The medical records tend to show Mrs. Leary had not yet issued a DPA to Anderson as of 12 January 2017 and Dr. Foster was requesting Anderson to obtain a guardianship of Mrs. Leary or a DPA. The undisputed evidence further demonstrates the purported 11 January 2017 DPA was not filed with the Mecklenburg County Register of Deeds until 21 October 2019, after the sale of her home had closed. This document was recorded 11 days after this lawsuit was filed on 10 October 2019.

¶ 47 Anderson stated under oath Mrs. Leary executed the Limited Power of Attorney to Sell Real Estate on 6 September 2019, nearly 15 months after Mrs. Leary was adjudicated incompetent.

¶ 48 A reasonable jury could find Mrs. Leary's doctor would not have suggested and advised Anderson to become Mrs. Leary's POA at the 12 January 2017 doctor's visit if Mrs. Leary had already executed a DPA naming Anderson her agent the day before.

¶ 49 A reasonable jury could also find Anderson's failure to record the purported 11 January 2017 DPA for over two and one-half years, and until almost a month after the home was sold, and 11 days after this

lawsuit was filed demonstrates the 11 January 2017 DPA was not actually executed on that date or it was not executed by Mrs. Leary. A reasonable jury could also find if the 11 January 2017 general DPA is valid, then Anderson's self-admitted subsequent Limited Power of Attorney to Sell Real Estate would not have been necessary. A reasonable jury could also find Mrs. Leary lacked capacity to authorize the 6 September 2019 limited POA after she was adjudicated incompetent in June 2018.

¶ 50 Genuine issues of material fact existed regarding Anderson's authority, her purported DPA and limited POA to sign the deed without prior court approval and, the proper disposition of the proceeds from the sale.

VI. *Lis Pendens*

¶ 51 For the foregoing reasons, Gokam Properties was not entitled to summary judgment. The trial court's cancellation of Plaintiffs' Notice of *Lis Pendens* is error as record notice of this pending litigation is proper. See N.C. Gen. Stat. § 1-116(a),(c) (2019).

VII. Conclusion

¶ 52 Summary judgment is a well-established procedural safeguard with protections built in for the nonmoving party. Upon *de novo* review, genuine issues of material fact exist in the record before us. We reverse the summary judgment for Gokam Properties and the cancellation of Plaintiffs' Notice of *Lis Pendens* and remand for further proceedings. *It is so ordered.*

REVERSED AND REMANDED.

Chief Judge STROUD and Judge DILLON concur.

ANNETTE LOCKLEAR, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF
AGRICULTURE AND CONSUMER SERVICES, RESPONDENT

No. COA20-604

Filed 19 October 2021

Public Officers and Employees—career employees—dismissal—unacceptable personal conduct—just cause—falsification of records

The administrative law judge's decision upholding a career state employee's (petitioner) dismissal from her job was affirmed where petitioner falsified records in connection with processing a pest control license renewal application and refused to cooperate in the subsequent investigation. Her actions constituted unacceptable personal conduct and conduct unbecoming to a state employee that is detrimental to state service, and her employer had just cause to dismiss her because her violation was severe, it resulted in a company being double billed and reputational harm to petitioner's employer, and she had a history of unacceptable work and conduct.

Appeal by petitioner from final decision entered 18 May 2020 by Administrative Law Judge Tenisha S. Jacobs in the Office of Administrative Hearings. Heard in the Court of Appeals 25 May 2021.

Jennifer J. Knox, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Christopher R. McLennan, for respondent-appellee.

STROUD, Chief Judge.

¶ 1 Annette Locklear ("Petitioner") appeals from a final decision by an administrative law judge ("ALJ") following a contested case hearing that found the North Carolina Department of Agriculture and Consumer Services ("the Department" or "Respondent") had just cause to dismiss Petitioner from her career state employment for unacceptable personal conduct. Petitioner first argues her actions did not constitute unacceptable personal conduct. Then, Petitioner argues even if her actions were unacceptable personal conduct, Respondent still did not have just cause to dismiss her. Because after *de novo* review we determine Petitioner

engaged in unacceptable personal conduct providing just cause to dismiss her, we affirm.

I. Background

¶ 2 The uncontested Findings of Fact in this case show Petitioner worked for the Department's[1] Structural Pest Control and Pesticides Division, Structural Pest Control Section, which enforces the Structural Pest Control Act of North Carolina of 1955, North Carolina General Statute § 106-65 (2019), prior to her dismissal for unacceptable personal conduct. At the time of the conduct at issue, John Feagans managed the unit as Petitioner's direct supervisor; Nicky Mitchell was a co-worker of Petitioner with the same duties; and James Burnette, Jr. was the director of the division. Alongside those people, Petitioner's job was to assist with "the licensing and certification of individuals authorized to perform structural pest control" work in the state. As relevant here, Petitioner processed annual license renewal applications using the Agricultural Regulatory System ("the System").[2]

¶ 3 The Findings of Fact describe the importance of the System:

> 17. The accuracy of the information in the AgRSys is critically important given that it is relied upon by NCDA&CS in regulating the structural pest control industry, members of the structural pest control industry that require a license/card in order to work, and members of the public. (TI pp 28-30, 106-06, 232-33; TII pp 307-09)
>
> 18. In explaining the importance of the AgRSys, Mr. Feagans testified:
>
> > [W]ith my job as the manager of the licensing system, there is no more important factor than our licensing system is accurate. There are too many people that rely on the information in this licensing system both in our office, out in the field, or the general public. And considering we're licensing people to do something potentially dangerous, as far as applying pesticides, we need to have a resource that we know the qualifications, whether they're legal and -- and

1. In the ALJ's Findings of Fact, the Department is abbreviated "NCDA&CS."

2. In the ALJ's Findings of Fact, the System is abbreviated "AgRSys."

> in compliance when they make these applications, and any other information.
>
> But it has to be reliable. We have to be able to go to this system and trust the information in it . . .
>
> (TI pp 105-06)
>
> 19. Errors in the AgRSys can reflect negatively on NCDA&CS and hinder the ability of NCDA&CS employees to complete their investigations and determine if violations of the law have occurred. (TI pp 30, 233; TII p 310) Additionally, maintaining inaccurate records that handles public funds (the renewal fees) could subject NCDA&CS to adverse internal/external audit findings. (TI p 109; TII p 310)

(Alteration in original).

¶ 4 Petitioner's conduct at issue in this case related to a specific license renewal application and the related information in the System. On 11 June 2018, Petitioner received a renewal application from Pest Management Systems, Inc. ("the Company") along with a $2,260 check (Check #41569) to cover the cost of renewal. When the Company had not heard about the status of its application by 20 June—well beyond the expected three to four day time period to process a renewal even during the busy renewal season—it called and reached Petitioner's co-worker Mitchell. Mitchell was unable to find the original renewal application, so with the renewal deadline looming, she told the Company to resubmit its application along with a new check and informed her supervisor, Feagans, about her actions, although Mitchell did not communicate with Petitioner. After receiving the application and a new $2,260 check (Check #41656), Mitchell processed the renewals, deposited the new check, and updated the information in the System on 26 June 2018.

¶ 5 Once Mitchell had completed the Company's license renewals, the System would reflect the renewals when anyone looked at it. In order to prevent issues after a renewal had already been processed, the Department also implemented multiple failsafe mechanisms. First, the System would show an error message to anyone attempting to proceed with a duplicate renewal and then prohibit such duplicate renewal. Second, the Department had paper files where an employee could look to determine if renewals had been processed when they received an error message from the System. Third, once renewals had been processed, only the IT Department could change the pertinent information

in the System. Petitioner and Mitchell further both knew they were only to contact IT after notifying their supervisor, Feagans, a fact of which Petitioner had been reminded as recently as 11 June 2018. Given these fail safes:

> [h]ad Petitioner, or anyone else, attempted to process the Pest Management Systems, Inc. renewals after Ms. Mitchell had already done so on 26 June 2018, it would be obvious that these licenses/cards had already been renewed and that depositing an additional check would result in the company being erroneously billed a second time. (Tl pp 209-12, 225-28, 231)

¶ 6 Despite those fail safes, and without notifying her supervisor as required, on 2 July 2018, Petitioner contacted IT to request the check number for the Company's renewal be changed in the System to reflect the check she had originally received, Check #41569. After IT made the requested changes, Petitioner undertook a series of actions that led to the System reflecting false information and the Department overbilling the Company by $2,260:

> 50. Following IT making the changes requested by Petitioner, the AgRSys "ReceiptNumber" listed Check #41569 as having been used to process the 38 license/card renewals for Pest Management Systems, Inc. on 26 June 2018. (Resp. Ex. 7) Additionally, as a result of the changes in the AgRSys requested by Petitioner, there was no record of Check #41656 in the system and anyone attempting to search for that check number would be unable to locate it. (TI p 61)
>
> 51. At the hearing, Petitioner admitted that, following her requested changes, the AgRSys would have shown that Check #41569 was used to issue the Pest Management Systems, Inc. renewals on 26 June 2018 and that she did not issue those licenses/cards on that date. (TII pp 468-69)
>
> 52. The evidence does show, and the Undersigned does find, that following Petitioner's requested changes to the AgRSys, the information reflected in the AgRSys for the altered records was false.
>
> 53. Given the multiple failsafe mechanisms, and the abundance of information available to Petitioner indicating that the renewals for Pest Management

> Systems, Inc. had already been renewed, the evidence does show, and the Undersigned does find that Petitioner knowingly falsified records in the AgRSys by her 2 July 2018 request for IT to change the Check Number associated with the renewals at issue.
>
> 54. After receiving the notification from IT that her requested changes had been made, Petitioner deposited Check #41569 on 3 July 2018 (22 days after it was originally assigned to her for processing). (Resp. Ex. 4 and 8)
>
> 55. By depositing Check #41569 on 3 July 2018, Petitioner over-billed Pest Management Systems, Inc. by $2,260.

¶ 7 On 7 August 2018, the Company realized it had been double billed and called Mitchell to report the problem. After Mitchell came to him to ensure the Company received a refund, Feagans began investigating. While Feagans originally believed Mitchell had made a mistake, the next day he learned about Petitioner's request to IT to change the information in the System. Following Petitioner's return from an unrelated leave, Feagans asked Petitioner to explain how the receipt number for the Company's license renewal had been changed in the System. Despite multiple opportunities to do so over the following days,[3] Petitioner never informed Feagans about her request to IT. In a final meeting with Feagans on 10 October, Petitioner again denied requesting IT change the check number in the System and also denied that Mitchell had performed the renewals, stating instead that Petitioner herself had processed the renewals.

¶ 8 On 2 November 2018, Petitioner was dismissed for unacceptable personal conduct on three grounds:

> 1. Material falsification of a State application or other employment documentation to include falsification of work-related documents (Falsification of records in the . . . System);
>
> 2. Conduct for which no reasonable person should expect to receive warning (Failure to cooperate with

3. Between Finding of Fact 60 and Finding 61, the listed year of the events changes, without explanation, from 2018 to 2019. Given the record indicates Petitioner returned from leave in October 2018, in accordance with Finding 60 and that Petitioner's dismissal occurred on 2 November 2018, the switch to 2019 appears to be a clerical error. The relevant events described in the Findings all appear to have occurred in 2018.

> an investigation and manipulating the licensing system in an attempt to falsely implicate a coworker and conceal your own wrongful actions); and
>
> 3. Conduct unbecoming a State employee that is detrimental to State service (Failure to cooperate with an investigation and manipulating the licensing system in an attempt to falsely implicate a coworker and conceal your own wrongful actions).

Following her dismissal, Petitioner filed an internal grievance, and, following a Step 2 Hearing, her dismissal was upheld on 18 January 2019. Petitioner then filed a petition commencing a contested case in the Office of Administrative Hearings. The ALJ's final decision following a contested case hearing affirmed the Department's decision to dismiss Petitioner based on unacceptable personal conduct. Petitioner appeals.

II. Analysis

¶ 9 Career state employees receive statutory protections from being, *inter alia*, discharged without "just cause." N.C. Gen. Stat. § 126-35(a) (2019). Just cause includes two potential bases for adverse disciplinary action: (1) action "imposed on the basis of unsatisfactory job performance" or (2) action "imposed on the basis of unacceptable personal conduct." 25 N.C. Admin. Code 1J.0604(b). Petitioner was dismissed for unacceptable personal conduct, so the issues here arise only from that basis.

¶ 10 Focusing on that basis, in *Warren v. North Carolina Dept. of Crime Control & Public Safety, North Carolina Highway Patrol*, this Court established a three-part test for determining whether just cause existed for adverse employment action against career state employees based on unacceptable personal conduct:

> The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."

221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012) (quoting *North Carolina Dept. of Environment and Natural Resources v. Carroll*, 358 N.C. 649, 669, 599 S.E.2d 888, 900 (2004)).

¶ 11 Here, Petitioner only argues the ALJ's decision erred with respect to *Warren*'s second and third inquiries.[4] Petitioner first argues she prevails under the second inquiry because her actions did not constitute unacceptable personal conduct. Although the argument is not listed as a separate issue presented, Petitioner then raises an issue under the third inquiry when she contends this Court should find no just cause to dismiss her because "something less than dismissal was the proper discipline for her actions." After addressing the standard of review, we will address each of the two contested inquiries in turn.

A. Standard of Review

¶ 12 As both parties agree, the standard of review for an administrative agency's decision is governed by North Carolina General Statute § 150B-51 (2019), which provides:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

---

4. Petitioner also would fail on the first inquiry because she did not challenge any of the ALJ's Findings of Fact on appeal. When Findings of Fact are not challenged, they are binding on appeal. *Smith v. N.C. Department of Public Instruction*, 261 N.C. App. 430, 444, 820 S.E.2d 561, 570–71 (2018) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). Because the Findings are binding on appeal, they establish "that [Petitioner] did, in fact, engage in the conduct described therein. Accordingly, the first prong of the *Warren* test is satisfied . . . ." *Id.*, 261 N.C. App. at 444, 820 S.E.2d at 571.

> (c) . . . With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

¶ 13 As subsection (c) explains, the standard of review depends on the type of case. N.C. Gen. Stat. § 150B-51(c). The differing standards of review can be broken down along the lines of the three inquiries under *Warren* as well. In *Carroll*—the case which *Warren* would later interpret, 221 N.C. App. at 380–83, 726 S.E.2d at 924–25—the Supreme Court explained "[d]etermining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for [the disciplinary action taken]." *Carroll*, 358 N.C. at 665, 599 S.E.2d at 898 (internal quotations omitted) (second alteration in original). This Court has previously explained that the first *Carroll* inquiry is a question of fact reviewed under the whole record test and that the second *Carroll* inquiry is a question of law reviewed *de novo*. *Whitehurst v. East Carolina University*, 257 N.C. App. 938, 943–44, 811 S.E.2d 626, 631 (2018). *Warren* determined that *Carroll*'s second inquiry required two separate analyses, which became the second and third *Warren* inquiries. *See Warren*, 221 N.C. App. at 380–83, 726 S.E.2d at 924–25 (explaining the difficulty in reconciling within the second *Carroll* inquiry *Carroll*'s insistence that a court find unacceptable personal conduct and that not all unacceptable personal conduct amounted to just cause before deciding to "balance the equities after the unacceptable personal conduct analysis" as part of three inquiry framework).

¶ 14 Thus, relying on *Whitehurst* provides the following standards of review. *Warren*'s first inquiry mirrors *Carroll*'s first inquiry. *Compare Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925 *with Carroll*, 358 N.C. at 665, 599 S.E.2d at 898. As a result, the first *Warren* inquiry employs the same standard of review as the first *Carroll* inquiry, the whole record test. *See Whitehurst*, 257 N.C. App. at 943, 811 S.E.2d at 631 (explaining first *Carroll* inquiry uses whole record test). Given the second and third *Warren* inquiries both derive from the second *Carroll* inquiry, they employ the same standard of review as the second *Carroll* inquiry, *de novo* review. *See id.*, 257 N.C. App. at 943–44, 811 S.E.2d at 631 (explaining the second *Carroll* inquiry uses *de novo* review).

¶ 15 Here, Petitioner only raises—and only can raise, *see supra* footnote 4 —issues under the second and third *Warren* inquiries. As a result, both issues are reviewed *de novo*. "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *Wetherington v. North Carolina Dept. of Public Safety*, 368 N.C. 583, 590, 780 S.E.2d 543, 547 (2015) ("*Wetherington I*") (internal quotations and alterations omitted).

B. *Warren* Inquiry Two: Unacceptable Personal Conduct

¶ 16 Petitioner first argues "none of [Petitioner's] actions constitute unacceptable personal conduct under the law," which aligns with *Warren*'s second inquiry. *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. First, Petitioner contends she could not have falsified records in the System because the term "falsify . . . indicates knowledge of untruth" and there is no evidence Petitioner "had any motive to falsify records" or "even knew that she was entering" inaccurate information. Petitioner then argues she also did not fail to cooperate with the investigation because she "made a mistake and did not intend to falsify the data" such that "it is more logical to conclude that any statements made to her supervisor during the investigation were the result of" a lapse in memory.

¶ 17 Unacceptable personal conduct "is a broad 'catch-all' category that encompasses a wide variety of misconduct by State employees that can result in dismissal without the need for a prior warning." *Smith*, 261 N.C. App. at 444, 820 S.E.2d at 571. As relevant here, unacceptable personal conduct includes:

> (a) conduct for which no reasonable person should expect to receive prior warning;
>
> . . .
>
> (e) conduct unbecoming a state employee that is detrimental to state service;
>
> . . .
>
> (h) falsification of a state application or in other employment documentation.

25 N.C. Admin. Code 1J.0614(8). In the past, this court has clarified conduct unbecoming under subsection (e) does not require a showing of actual harm, "only a potential detrimental impact (whether conduct like the employee's could potentially adversely affect the mission or legitimate interests of the State employer)." *Smith*, 261 N.C. App. at 445, 820 S.E.2d at 571 (internal quotations omitted). Additionally, as the State Human Resources Manual explains, falsification under subsection (h)

includes "falsification of work-related documents." State Human Resources Manual § 7, p. 4 (2017).[5]

¶ 18 Here, the ALJ's Findings of Fact are undisputed and therefore binding on appeal. *Smith*, 261 N.C. App. at 444, 820 S.E.2d at 570–71 (citing *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731). The ALJ found that after Petitioner's requested changes were made to the System, the information in the System "was false" because the System would have indicated the check number she used was for work done on 26 June 2018, which Petitioner admitted was not the date she issued a license renewal. Further, "[g]iven the multiple failsafe mechanisms, and the abundance of information available to Petitioner indicating that the renewals for [the Company] had already been renewed," the ALJ found "Petitioner *knowingly* falsified records" in the System. (Emphasis added) Those two findings alone show Petitioner falsified work related documents, which amounts to unacceptable personal conduct under 25 N.C. Admin. Code 1J.0614(8) and the State Human Resources Manual § 7, p. 4.

¶ 19 The same findings also refute Petitioner's argument she did not know she was entering inaccurate information because Petitioner "*knowingly* falsified" the information. (Emphasis added) Further, the System included numerous fail safes to prevent such inadvertent error. The System would provide an error message to anyone trying to proceed with a license renewal that had already been completed, prohibit such duplicate renewal, and indicate in the hard copy file who had renewed the licenses and on what date. Given those fail safes, we agree with the ALJ's binding Finding of Fact that Petitioner knowingly falsified the records. Additionally, the false nature of the information in the System would be apparent to anyone who looked. The System said Petitioner had completed the work on 26 June even though she did not make a request to IT to enable her to perform the work until 2 July. Based on the circumstances, Petitioner knew she was entering false information to the System regardless of her current attempt to claim otherwise.

¶ 20 Petitioner's argument she lacked motive is similarly unconvincing. She cites no authority indicating motive is a relevant consideration when determining whether she falsified a work-related document. Additionally, even Petitioner's own definition of falsify requires merely knowledge of untruth, not a specific reason for causing the untruth. Thus, using Petitioner's definition, the undisputed facts show Petitioner falsified a work related document.

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5. Available at: https://oshr.nc.gov/media/1580/open (as of 9 September 2021).

¶ 21 The falsification basis alone would be enough for Petitioner to fail on the second *Warren* inquiry because "[o]ne act of [unacceptable personal conduct] presents 'just cause' for any discipline, up to and including dismissal." *Hilliard v. North Carolina Dept. of Correction*, 173 N.C. App. 594, 597, 620 S.E.2d 14, 17 (2005). However, the ALJ also concluded Petitioner had committed unacceptable personal conduct on the basis that she engaged in "conduct unbecoming a state employee that is detrimental to state service." 25 N.C. Admin. Code 1J.0614(8)(e). While Petitioner does not clearly state she is challenging this basis, we assume she is because she argues she "had no motive or reason to lie or be uncooperative in the ensuing investigation" and such failure to cooperate was listed as a basis for the conduct unbecoming charge in her original dismissal letter. First, to the extent that this argument is based on her argument that she did not knowingly falsify records, it fails because the uncontested Findings of Fact support that Petitioner knowingly falsified the information in the System. Second, other Findings of Fact layout how Petitioner lied and was uncooperative in the ensuing investigation regardless of whether she had motive to be. Petitioner repeatedly failed to inform her supervisor that she had contacted IT to request they change information in the System and also falsely told her supervisor that she, rather than her co-worker Mitchell, had completed the Company's renewals. These undisputed facts indicate Petitioner failed to cooperate in the investigation, supporting the separate conduct unbecoming basis for finding unacceptable personal conduct.

¶ 22 The conduct unbecoming basis also finds strong support in the record based on Petitioner's other actions. As the uncontested Findings of Fact state, the System's accuracy in general is important because the public uses it to confirm that people applying potentially dangerous pesticides are licensed and because the state uses it to regulate the industry and conduct investigations as necessary. The System also contains records related to public funds, and, thus, inaccuracies could subject the Department to adverse audit findings. The inaccuracies Petitioner caused resulted in the Company being temporarily overbilled by $2,260. Based on those facts, Petitioner's conduct "could potentially adversely affect the mission or legitimate interests of the State employer," as required to conclude an employee committed unbecoming conduct, and, in fact, Petitioner's actions did cause such harm. *Smith*, 261 N.C. App. at 445, 820 S.E.2d at 571. Thus, even if Petitioner had not falsified records, as we concluded above, she still committed conduct unbecoming of a state employee and thus engaged in unacceptable personal conduct. Based on our *de novo* review, we conclude Petitioner

committed unacceptable personal conduct, thereby satisfying the second *Warren* inquiry.

C. *Warren* Inquiry Three: Just Cause

¶ 23 Finally, Petitioner contends the ALJ erred in conducting *Warren*'s third inquiry, which requires determining "whether th[e] misconduct amounted to just cause for the disciplinary action taken." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. Petitioner first contends she was never "told the truth" that the application had been reassigned to her coworker Mitchell and argues this "deliberate[] exclu[sion] from important office communications" and then firing her "when she erred in the absence of that information . . . is simply not the *equity and fairness* to the employee required in the just cause context." (Emphasis in original) (internal quotations omitted) Petitioner then separately argues we should reconsider the relevant just cause factors because they "show that something less than dismissal was the proper discipline for [Petitioner's] actions."

¶ 24 When making the just cause determination, the reviewing court must examine "the facts and circumstances of each individual case" because just cause "is a flexible concept, embodying notions of equity and fairness." *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900 (internal quotations omitted). To aid in making that individualized determination during *Warren*'s third inquiry, we look at the factors set forth in *Wetherington I*. *Whitehurst*, 257 N.C. App. at 945, 811 S.E.2d at 632. Those factors include: "the severity of the violation, the subject matter involved, the resulting harm, the [employee]'s work history, or discipline imposed in other cases involving similar violations." *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548. We have recently explained that, in context, the word "or" in the list "must be read as 'and' when applied to the factors which should be considered." *Wetherington v. North Carolina Dept. of Public Safety*, 270 N.C. App. 161, 189–90, 840 S.E.2d 812, 831 (2020) ("*Wetherington II*"). Thus, courts must consider "any factors for which evidence is presented." *Id.*, 270 N.C. App. at 190, 840 S.E.2d at 832.

¶ 25 Petitioner first contends she was not afforded the general "equity and fairness to the employee required in the just cause context" because "she was deliberately excluded from important office communications regarding matters to which she had been assigned, and then fired when she erred in the absence of that information. (Emphasis removed) In support of this argument, Petitioner cites *Whitehurst* for the point that "an employee's conduct must be judged with reference to the facts of which he was aware at the time of his actions."

¶ 26 Petitioner's reliance on *Whitehurst* is misplaced. *Whitehurst* states the cited point in the context of a case where a police officer knew that a person had committed an assault but did not know that the same person had separately been assaulted because no one told him about the second assault, including the victim of the second assault when the officer explicitly asked him what happened. 257 N.C. App. at 947, 811 S.E.2d at 633. In that case, the officer did not have facts held against him in a situation where he took steps to try to ascertain the unknown facts. By contrast, here Petitioner did not act in a way that would have led her to uncover the facts she now complains were withheld from her. Beyond the System's failsafe mechanisms that we have already discussed, the uncontested Findings of Fact detail how Petitioner was supposed to notify her supervisor before requesting IT make changes in the System but failed to take that step. Had Petitioner acted properly and asked her supervisor before contacting IT, her supervisor, who knew that Petitioner's co-worker had inquired about the renewal application before going on to process it herself, would have informed Petitioner that the co-worker had processed the application already. Thus, this case is not similar to *Whitehurst* because here Petitioner did not try to uncover the unknown facts about which she now complains despite Petitioner being told to follow a process that would have uncovered those very facts.

¶ 27 Further, Petitioner still ultimately decided to enter false information into the System as laid out above. Other people failing to inform her of certain facts did not change her own actions. Thus, Petitioner's argument she was not afforded the general equity and fairness underlying just cause does not sway us.

¶ 28 Turning to Petitioner's second argument, we are asked to reweigh the *Wetherington I* factors, which include: "the severity of the violation, the subject matter involved, the resulting harm, the [employee]'s work history, [and] discipline imposed in other cases involving similar violations." *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548; *see Wetherington II*, 270 N.C. App. at 189–90, 840 S.E.2d at 831 (explaining the "or" in the original factors list must be read as "and" given the context). We briefly address each factor again relying on the uncontested Findings of Fact.

¶ 29 Taking the first two factors together, the violation is severe precisely because of the subject matter involved. As explained previously, the System relies on accurate information to protect the public from unlicensed people performing potentially dangerous pesticide applications. Petitioner herself even verified the importance of the System having

accurate information because she checks the System to verify licensure status. Given the importance of the integrity of the System in protecting the public, Petitioner's violation was severe.

¶ 30 Petitioner's violation was also severe because of the resulting harm. Petitioner's actions led to the Company being double billed and thus overpaying $2,260. While a refund was issued about a month later, the Company still lacked money it should rightfully have had for that month. Further, the Company itself discovered the error and was "not happy" according to Petitioner's co-worker Mitchell, who received their call, which indicates this instance was one of the situations where an error in the System "reflect[ed] negatively" on the Department leading to reputational harm. Thus, while Petitioner contends the ALJ found no harm resulted, we conclude on *de novo* review that Petitioner's actions caused actual harm both to the overbilled Company and to the Department's reputation.

¶ 31 Examining the fourth factor, Petitioner's work history also favors finding just cause. Petitioner's supervisors described her as "uncooperative, aggressive towards her coworkers, and disrespectful and dismissive" during "the course of her employment." (Internal quotations omitted) They also described her work as "oftentimes unacceptable" and merely "acceptable at best," an assessment borne out by her overall "Does Not Meet Expectations" rating in her 2017-2018 performance review. Further, Petitioner had already received a prior written warning for unacceptable personal conduct and a two-week disciplinary suspension without pay for a violation of the workplace violence policy. Additionally, Petitioner's supervisors had attempted to help improve her performance and workplace conduct for "over a decade" and even reiterated their desire to help her as recently as 30 April 2018, mere months before the conduct that led to Petitioner's dismissal. While Petitioner argues the ALJ only examined the prior two years when reviewing her work history, the uncontested Findings of Fact describe behavior "over the course of [Petitioner's] employment" and convey attempts to help her improve for "over a decade."

¶ 32 The record before us resembles another case where this Court recently found just cause. There, this Court found just cause when the employee's work history included "a pattern of petulant, inappropriate, and insubordinate behavior . . . that extended over the course of several years" and that did not change "[d]espite repeated attempts" from supervisors to help the employee. *Smith*, 261 N.C. App. at 446–47, 820 S.E.2d at 572. The record here shows a similar pattern with Petitioner's behavior, which also did not improve after her supervisor's repeated attempts

to help. Thus, we similarly conclude Petitioner's work history supports finding just cause.

¶ 33 The final *Wetherington I* factor is whether the discipline in this case aligns with discipline in similar cases. 368 N.C. at 592, 780 S.E.2d at 548. Petitioner first highlights "there was no evidence or findings of fact regarding the disciplined [sic] imposed in other cases involving similar violations." While Petitioner is correct, this absence does not impact our overall analysis. The decisionmaker is only required to consider factors "*for which evidence is presented*" such that they cannot rely on one factor while ignoring others. *Wetherington II*, 270 N.C. App. at 190, 840 S.E.2d at 832 (emphasis added). The ALJ here considered all four other *Wetherington I* factors and could not have considered the similar discipline factor because as Petitioner admits, there is no evidence on that factor. Petitioner also repeats her argument that the ALJ failed to take into account that no one was disciplined for not informing her they separately processed the license renewal, but we have already rejected that argument above.

¶ 34 After reviewing each of the *Wetherington I* factors, equity and fairness support the decision to dismiss Petitioner. Thus, after our *de novo* review, we find just cause to dismiss Petitioner existed.

D. Findings of Fact Supporting Conclusions of Law

¶ 35 In addition to the arguments within the *Warren* framework, Petitioner's "Issues Presented" section of the brief also raises as an issue for review whether "the trial court's findings of fact regarding the discipline imposed on Petitioner support its conclusions of law?" (Capitalization altered) However, at no point in the remainder of the brief does Petitioner discuss this issue or indicate which Conclusions of Law are unsupported by the Findings of Fact. As a general matter, issues "in support of which no reason or argument is stated[] will be taken as abandoned." N.C. R. App. P. 28(b)(6); *see also* N.C. R. App. P. 28(a) ("Issues not presented and *discussed* in a party's brief are deemed abandoned.") (emphasis added). This Court has also previously said that when an appellant listed an additional "Issue Presented" in its brief but "fail[ed] to argue this issue in the text of the brief" the appellant abandoned the challenge. *Capital Resources, LLC v. Chelda, Inc.*, 223 N.C. App. 227, 233 n.4, 735 S.E.2d 203, 208 n.4 (2012). Here, we similarly conclude Petitioner has abandoned the issue of whether the Findings of Fact support the Conclusions of Law by "failing to argue this issue in the text of the brief." *Id.*

¶ 36 Even if Petitioner had not abandoned the challenge, we still find no error. Many of the potentially contested Conclusions of Law concern the second and third *Warren* inquiries, and we have already reviewed those Conclusions *de novo* and the Conclusions are supported by the uncontested Findings of Fact. Further, as stated above, we did not review the Conclusions for the first *Warren* inquiry because they simply relied on the uncontested Findings of Fact. *See supra* footnote 4. Thus, even if the issue is not abandoned, the Findings of Fact support the Conclusions of Law based on what we have already explained.

III. Conclusion

¶ 37 After *de novo* review of the two contested *Warren* inquires, we find there was just cause to dismiss Petitioner. To the extent Petitioner has not abandoned the issue, the Findings of Fact support the Conclusions of Law. Therefore, we affirm the decision of the ALJ upholding Petitioner's dismissal.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

VELMA SHARPE-JOHNSON, Petitioner
v.
NC DEPARTMENT OF PUBLIC INSTRUCTION EASTERN NORTH CAROLINA SCHOOL FOR THE DEAF, Respondent

No. COA20-869

Filed 19 October 2021

Public Officers and Employees—career state employee—just cause for dismissal—driving school bus in excess of speed limit

Just cause existed to dismiss petitioner from employment as a school bus driver based upon substantial evidence that she drove in excess of 55 miles per hour when transporting a student in a vehicle that met the definition of "school activity bus" in N.C.G.S. § 20-4.01(27)(m). Petitioner's average rate of speed of over 70 miles per hour along a 90-mile route in violation of state law and state agency regulations constituted grossly inefficient job performance and unacceptable personal conduct.

Appeal by Petitioner from final decision entered 28 September 2020 by Administrative Law Judge William T. Culpepper, III, in the Office of Administrative Hearings. Heard in the Court of Appeals 8 September 2021.

Jennifer J. Knox for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Stephanie C. Lloyd, for Respondent-Appellee.

COLLINS, Judge.

¶ 1 Petitioner Velma Sharpe-Johnson appeals from a Final Decision of the Office of Administrative Hearings affirming her dismissal from her position as an Educational Development Assistant by Respondent North Carolina Department of Public Instruction, Eastern North Carolina School for the Deaf. Petitioner argues that "the trial court err[ed] in determining that there was substantial evidence to prove that the Petitioner committed the alleged conduct[.]" Because substantial evidence in the whole record supported the findings that Petitioner engaged in grossly inefficient job performance and unacceptable personal conduct, we affirm.

I. Procedural History

¶ 2 Respondent dismissed Petitioner from employment on 19 December 2019 and issued a final agency decision affirming the dismissal on 24 March 2020. Petitioner timely filed a petition for a contested case hearing in the Office of Administrative Hearings.

¶ 3 On 28 September 2020, an Administrative Law Judge ("ALJ") issued a Final Decision affirming Respondent's dismissal of Petitioner. Petitioner exhausted the agency processes to grieve the dismissal. Petitioner timely gave notice of appeal to this Court.

II. Factual Background

¶ 4 The Eastern North Carolina School for the Deaf ("ENCSD") serves both day students and residential students. Residential students arrive at the school on Sunday afternoon, remain on campus throughout the school week, and return home on Friday afternoon. ENCSD operates bus routes to pick up residential students on Sundays and return them home on Fridays. Each bus is staffed by two ENCSD Educational Development Assistants; one serves as the driver and the other as the bus monitor. The bus monitor is responsible for recording departure times, arrival times, and student attendance in real time on a "route sheet." The

busses contain a GPS supplied by the school that is supposed to blink red and beep if the bus exceeds 55 miles per hour.

¶ 5 Petitioner was a career state employee employed by ENCSD as an Educational Development Assistant. Petitioner's responsibilities included "[d]riving ENCSD vehicles for student transportation and maintaining a non-expired NCDMV operations license," "complet[ing] all necessary training regarding the operation of state vehicles," supervising students being transported, and "providing safe and secure travel to and from ENCSD."

¶ 6 In August 2019, Petitioner signed a "Statement of Understanding – 2019-2020" containing the following acknowledgements:

> I am aware that the NC DPI Education Services for the Deaf and Blind's Policy and Procedures Manual, NC DPI Policies and Procedures, [and] the OSHR State Human Resources Manual . . . [are] available to me on the ENCSD Intranet and/or the NC Dept of Public Instruction's website and/or upon request to my manager or Human Resources.
>
> I recognize that I am responsible for reading/viewing these policies and for making myself familiar/knowledgeable of all OSHR, ESDB, NC DPI policies as they may relate to my employment.
>
> I agree to conduct my activities in accordance with all Education Services for the Deaf and Blind's and DPI procedures and policies and understand that breaching these standards may result in disciplinary action up to and including dismissal.
>
> Web addresses to the aforementioned policies and procedure[s] have been provided to me during the Human Resources, New Employee Orientation presentation.

The Education Services for the Deaf and Blind Policies included a requirement that "[s]taff transporting students shall meet all the requirements and safety regulations of the Department of Motor Vehicles and the Department of Public Instruction."

¶ 7 Petitioner also participated in a training for ENCSD transportation staff at the beginning of the 2019-20 school year. At the training, Petitioner received a "North Carolina School Bus Driver Handout" which stated:

According to G.S. 20-218(b):

> It is unlawful to drive a school bus occupied by one or more child passengers over the highways or public vehicular areas of the State at a greater rate of speed than 45 miles per hour.
>
> It is unlawful to drive a school activity bus occupied by one or more child passengers over the highways or public vehicular areas of North Carolina at a greater rate of speed than 55 miles per hour.

¶ 8 Debra Pierce, first shift transportation coordinator for ENCSD, received a phone call at approximately 3:00 pm on Friday, 22 November 2019, from a person who identified himself as Terry Grier. According to Pierce, the caller

> said he was calling out of concern, that there was a bus on I-40. He identified the bus as a white activity bus that had Eastern North Carolina School for the Deaf on the side, Bus Number 34. And he said it was going at a high rate of speed, occupied by one or more passengers.

The caller informed Pierce that he "was observing the bus going at a high rate . . . of speed, between 80 and 85" and "at some points 90 to 95 miles per hour" with at least two passengers on board the bus. In the video, the caller can be heard stating:

> I am riding down Interstate 40, this is activity bus number 34, it says that it's from the Eastern NC School for the Deaf, Wilson County, my speedometer . . . is averaging between 80 and 90 miles per hour, looks like there is a driver and at least two passengers on the van, it seems to be going pretty fast for an activity bus on the interstate.

¶ 9 Based on the time of the call and the direction of travel, Pierce concluded that the bus was en route to the final stop in Supply, North Carolina. Pierce knew that Petitioner, ENCSD employee Sheeneeka Settles, and a student passenger were on Bus 34 at that time. Pierce went to the office of Dr. Michele Handley, director of ENCSD, and called the bus cell phone. Settles answered the phone and confirmed that Petitioner was driving the bus.

¶ 10 According to the route sheet from 22 November 2019, Bus 34 left the stop in Warsaw, North Carolina at 2:32 pm with one student on board

and arrived at the Supply stop at 3:49 pm. Pierce testified that the bus was not scheduled to arrive at the Supply stop until 4:15 pm.

¶ 11 On 2 December 2019, ENCSD placed Petitioner on investigatory leave with pay. That day, Pierce spoke with Petitioner. According to Pierce, Petitioner denied driving 80 to 85 miles per hour but "admit[ted] to speeding up a little over 55 to pass a vehicle that was in front of her" and acknowledged that one student was on the bus. In a handwritten note on the bottom of the letter informing Petitioner of the investigatory leave, Petitioner wrote, "I was not going 80 mph, I pass and had to speed up to pass, and when I try to get back over the car speeded up and would not let me over . . . . I have [a] CDL and would not take that chance of losing my CDL."

¶ 12 During the investigation, on Friday, 13 December, Pierce drove Bus 34 on the same route that Petitioner had driven on Friday, 22 November. Settles rode with Pierce and completed the route sheet. Pierce departed the stop in Warsaw at 2:30 pm and arrived at the stop in Supply at 4:15 pm. Pierce also spoke with Settles during the investigation. According to Pierce, Settles indicated that she was looking out the window and not paying attention to Petitioner's driving, and that she did not see the GPS red light or hear the beeping.

¶ 13 Respondent held a predisciplinary conference on 18 December 2019 at which Petitioner insisted that she had not driven over 55 miles per hour. ENCSD dismissed Petitioner effective 19 December 2019 based on both grossly inefficient job performance and unacceptable personal conduct of "exceed[ing] a speed of 55 mph while operating a student and staff occupied" ENCSD activity bus, which violated N.C. Gen. Stat. § 20-218 and Education Services for the Deaf and Blind Policies, and created "the potential to cause death or serious bodily injury."

¶ 14 After Respondent's final agency decision upholding the dismissal, Petitioner filed a petition for a contested case hearing. Following a hearing, the ALJ found that Petitioner had engaged in the alleged conduct by "operat[ing] ENCSD bus #34, traveling on Interstate 40, at a speed in excess of 55 miles per hour which is in violation of N.C.G.S. § 20-218(b)" and the Education Services for the Deaf and Blind Policies. The ALJ found that Petitioner's conduct amounted to grossly inefficient job performance and unacceptable personal conduct as follows:

> 21. . . . [D]riving at a speed that exceeds the set limit increases the risk that the driver will lose control of the vehicle while trying to adapt to changing road conditions. In turn, this increased risk creates further

potential for death or serious bodily injury to the driver, the passengers entrusted to the driver's care, and everyone else sharing the road with him or her.

22. Petitioner's conduct of driving an ENCSD bus at a grossly excessive speed over the 55 miles per hour speed limit was a gross failure of Petitioner to perform her job requirements as specified by management. By Petitioner's own admissions, it was an expectation of her job not to exceed 55 miles per hour while driving a bus. . . .

23. Petitioner's driving of an ENCSD bus at an average speed in excess of 70 miles per hour for a distance of 90 miles and for a time period of 1 hour and 17 minutes created the potential for death or serious bodily injury to her fellow employee, Ms. Settles, members of the public, and a member of the ENCSD student population over whom Petitioner had responsibility.

. . . .

26. Petitioner's conduct falls within the first category of unacceptable personal conduct. Given the inherent risks associated with Petitioner's conduct, most significantly, the increased risk of death or serious bodily injury to a member of the student population entrusted to her care, no reasonable person should expect to receive a prior warning for such conduct.

27. Petitioner's conduct falls within the second category of unacceptable personal conduct. Petitioner's conduct was a violation of state law, to wit: N.C.G.S. § 20-218(b), which makes it unlawful to operate a school activity bus occupied by one or more child passengers over the highways or public vehicular areas of North Carolina at a greater rate of speed than 55 miles per hour.

28. Petitioner's conduct falls within the third category of unacceptable personal conduct. By Petitioner's own admissions and testimony, she violated known or written work rules. Petitioner repeatedly admitted that she was not to drive a bus more than 55 miles per hour during the performance of her work duties. . . .

> 29. Petitioner's conduct falls within the fourth category of unacceptable personal conduct. . . .
>
> . . . .
>
> 30. Here, Petitioner's conduct had the potential to detrimentally impact Respondent's mission and legitimate interests of providing educational programs to deaf and hard of hearing students while simultaneously promoting their safety and wellbeing.
>
> . . . .
>
> 31. . . . Petitioner's conduct of far exceeding the required 55 miles per hour speed limit while transporting a student was potentially detrimental to Respondent's mission and legitimate interests and, thus, was conduct unbecoming of a state employee and detrimental to state service.

The ALJ concluded that Petitioner's grossly inefficient job performance and unacceptable personal conduct amounted to just cause for dismissal and affirmed Petitioner's dismissal. Petitioner appeals.

III. Discussion

¶ 15 Petitioner challenges the ALJ's finding that she engaged in the alleged conduct.

¶ 16 A career state employee subject to the North Carolina Human Resources Act may only be discharged "for just cause." N.C. Gen. Stat. § 126-35(a) (2020). "Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, whether the employee engaged in the conduct the employer alleges, and second, whether that conduct constitutes just cause for the disciplinary action taken." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004) (quotation marks, brackets, and citation omitted). We review de novo the conclusion that an employer had just cause to dismiss an employee. *Id.* at 666, 599 S.E.2d at 898.

¶ 17 Where a party contends that a final decision was unsupported by substantial evidence, "the court shall conduct its review of the final decision using the whole record standard of review." N.C. Gen. Stat. § 150B-51(b)(5), -51(c) (2020). "Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dep't of Hum. Res.*, 91 N.C. App. 527,

530, 372 S.E.2d 887, 889 (1988) (citation omitted). Substantial evidence "means relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2020). Unchallenged findings of fact are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

¶ 18 Petitioner argues that there was not substantial evidence in support of the determination that she violated N.C. Gen. Stat. § 20-218 because Bus 34 was neither a "school bus" nor an "activity bus" as defined in N.C. Gen. Stat. § 20-4.01(27)(m) and (n). Petitioner's argument is misguided.

¶ 19 The ALJ found "that ENCSD bus #34 is a school activity bus as defined in N.C.G.S. § 20-4.01(27)(m)." A school activity bus is defined as "[a] vehicle, generally painted a different color from a school bus, whose primary purpose is to transport school students and others to or from a place for participation in an event other than regular classroom work." N.C. Gen. Stat. § 20-4.01(27)(m) (2020). A school bus is defined, in part, as "[a] vehicle whose primary purpose is to transport school students over an established route to and from school for the regularly scheduled school day . . . that is painted primarily yellow below the roofline. . . ." *Id.* § 20-4.01(27)(n).

¶ 20 Evidence presented at the hearing showed that the vehicle driven by Petitioner was "a white activity bus" that is "one of the shorter buses" that the school has. The words "Eastern North Carolina School for the Deaf" and the number "34" were visible on the side of the bus.

¶ 21 Petitioner argues that because the bus was being used to transport a child home from the school, the bus did not fit the definition of an activity bus. Specifically, Petitioner argues that "[w]hile bus #34 looked like a school activity bus, its primary purpose was to transport students to and from school over an established route for their regularly scheduled school day." However, the evidence at the hearing was that the bus was being used to pick up residential students from various stops in southeastern North Carolina on Sundays, transport them to the school grounds where they resided until Friday afternoons, and then transport them back to southeastern North Carolina. At the time in question, Bus 34 was not being used to transport a student to and from school for the regularly scheduled school day but was instead being used to transport a student from their place of residence at the school to their place of residence at home, outside of the regularly scheduled school day, on a route which was approximately six and a half hours round trip. Furthermore, while an activity bus is a vehicle whose "primary purpose" is to transport students to and from events

other than regular classroom work, nothing in the statute prohibits an activity bus from being used for other purposes, such as transporting a child to and from their residence for the week. There was substantial evidence in the whole record to support the ALJ's finding that Bus 34 was an activity bus as defined in section 20-4.01(27)(m).

¶ 22 Substantial evidence in the whole record otherwise supports the ALJ's findings that Petitioner engaged in unacceptable personal conduct and grossly inefficient job performance. Pierce testified, and the ALJ found, that Petitioner was driving Bus 34 with a coworker and student on board; the route sheets showed that Petitioner had completed the route 28 minutes faster than Pierce had; and the witness stated to Pierce that Bus 34 was being driven "at a high rate of speed, between 80 and 85 mph, and at some points going as fast as 90 to 95 mph[.]"[1] The ALJ further found that "for Petitioner to travel the 90 miles between the Warsaw stop and the Supply stop in 1 hour and 17 minutes on the day in question, she would have had to average a speed in excess of 70 mph the entire way." This finding was supported by the ALJ's official notice of the distance between the two stops, pursuant to N.C. Gen. Stat. §§ 150B-30 and 8C-1, Rule 201, which Petitioner does not appeal. Lastly, the ALJ found that "Petitioner's own admissions show that it was a requirement of her job and a known work rule that she was not to drive an ENCSD bus at a speed greater than 55 miles per hour." Because Petitioner does not challenge this finding, it is binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

¶ 23 Petitioner contends that "[a]t no time did the GPS monitor beep or flash on the route the Petitioner drove" on 22 November 2019. While Petitioner testified that the GPS monitor did not flash, Pierce, Handley, and Petitioner herself each testified that the GPS devices were unreliable. Though Settles testified that she did not see the GPS blinking or flashing to indicate that Petitioner was speeding, the ALJ also received evidence that Settles had been looking out the window of the bus and had no view of the speedometer.

¶ 24 Petitioner also attacks the credibility of the reporting witness' opinion that Petitioner reached speeds of 80 to 95 miles per hour, questions the weight the ALJ gave to the route sheets admitted into evidence, and contends that Respondent should have introduced other route sheets recorded on the Friday afternoon route. These arguments are unavailing because, "[l]ike the jury in a jury trial, the ALJ is the sole judge of

1. The ALJ also admitted the audio portion of the recording that the witness sent Pierce as a present sense impression pursuant to N.C. Gen. Stat. § 8C-1, Rule 803.

the credibility of the witnesses and the weight to be given to the evidence as the finder of fact." *N.C. Dep't of State Treasurer v. Riddick*, 274 N.C. App. 183, 852 S.E.2d 376, 382 (2020). Moreover, a reviewing "court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Watkins v. N.C. St. Bd. of Dental Examiners*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004).

IV. Conclusion

¶ 25 Substantial evidence in the whole record supported the ALJ's findings that Petitioner engaged in grossly inefficient job performance and unacceptable personal conduct. The ALJ did not err by affirming Respondent's dismissal of Petitioner.

AFFIRMED.

Judges ARROWOOD and JACKSON concur.

STATE OF NORTH CAROLINA
v.
ALLEN ANTHONY CAMPBELL, DEFENDANT

No. COA20-646

Filed 19 October 2021

1. Appeal and Error—Appellate Rule 2—exceptional circumstances—trial court's comments regarding race and religion

The Court of Appeals invoked Appellate Rule 2 to consider the merits of defendant's argument that the trial court's comments regarding race and religion during jury selection deprived him of a fair trial, where defendant did not object at trial, the issue was not preserved as a matter of law, and the case presented exceptional circumstances justifying the use of Rule 2.

2. Criminal Law—structural error—trial court's comments during jury selection—race and religion

There was structural error in defendant's trial for multiple traffic offenses where, after excusing a potential juror who claimed that his Baptist religion prevented him serving as a juror, the trial court made comments regarding race and religion in an effort to admonish

African American potential jurors regarding their duty to serve as jurors. The trial court's comments could have negatively influenced the jury selection process, including by discouraging other potential jurors from responding honestly to questions regarding their ability to be fair and honest, thereby denying defendant a fair trial.

Judge DILLON dissenting.

Appeal by defendant from judgment entered 2 December 2019 by Judge Lora Christine Cubbage in Superior Court, Guilford County. Heard in the Court of Appeals 7 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.

Anne Bleyman, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Allen Anthony Campbell ("Defendant") appeals from a judgment entered upon jury verdicts finding him guilty of various traffic offenses. We agree with both Defendant and the State that the trial court's comments during jury selection deprived Defendant of a fair and impartial trial. Defendant is entitled to a new trial.

I. Background

¶ 2 On 22 July 2019, in connection with events occurring on 7 June 2019, Defendant was indicted with driving while license revoked, failure to heed light or siren, speeding, reckless driving to endanger, fictitious altered title or registration card, failure to wear a seat belt, fleeing to elude arrest, and attaining habitual felon status. Defendant's jury trial began on 18 November 2019 in Guilford Country Superior Court. During jury selection, the prosecutor questioned the whole panel of potential jurors:

> Do any of the 12 of you have such strong personal beliefs -- some folks call it "sitting in judgment" -- that they don't feel comfortable sitting and listening to the evidence in this case and rendering a verdict of either "guilty" or "not guilty" in this case? And that could be because of religious reasons or ethical reasons or moral reasons. Anybody have such strong beliefs?

In response, prospective juror Hairston raised his hand. After explaining that the jury's role is not "really judging a defendant" but, instead, "to determine whether the State has met its burden of proof[,]" the prosecutor inquired if juror Hairston would "still feel uncomfortable or . . . would be unable to perform the function of a juror in this case[.]" Juror Hairston said "yes" based on "religion[.]"

¶ 3 When the prosecutor moved to challenge juror Hairston for cause, the trial court interjected:

> THE COURT: Well, hold on. Let me question Mr. Hairston a little bit more. So, Mr. Hairston, you're saying that you don't think because of -- what religion are you?
>
> JUROR HAIRSTON: Non-denominational. A Baptist.
>
> THE COURT: So non-denomina[tional] Baptist, you don't think that you could sit here and listen to the facts of the case and decide whether you think this gentleman over here is "guilty" or "not guilty"?
>
> JUROR HAIRSTON: No, ma'am.
>
> THE COURT: Okay. I'm going -- we're going to excuse him for cause, but let me just say this, and especially to African Americans: Everyday we are in the newspaper stating we don't get fairness in the judicial system. Every single day. But none of us -- most African Americans do not want to serve on a jury. And 90 percent of the time, it's an African American defendant. So we walk off these juries and we leave open the opportunity for -- for juries to exist with no African American sitting on them, to give an African American defendant a fair trial. So we cannot keep complaining if we're going to be part of the problem. Now I grew up Baptist, too. And there's nothing about a Baptist background that says we can't listen to the evidence and decide whether this gentleman, sitting over at this table, was treated the way he was supposed to be treated and was given -- was charged the way he was supposed to be charged. But if your -- your non-denomina[tional] Baptist tells you you can't do that, you are now excused.

The jury was impaneled, and the trial proceeded.

¶ 4 After presentation of the evidence, the trial court dismissed the fictious altered title or registration card charge. On 21 November 2019, the jury returned verdicts finding Defendant not guilty of failure to wear a seat belt, and guilty of the remaining charges. Defendant pleaded guilty to attaining habitual felon status. The trial court arrested the convictions for driving while license revoked and reckless driving, and sentenced Defendant to 86 to 116 months imprisonment. Defendant appeals.

II. Trial Court's Statements

¶ 5 Defendant argues he "was denied a fair trial in an atmosphere of judicial calm before an impartial judge and a jury with free will in violation of his rights." (Capitalization altered.) Specifically, Defendant asserts his "due process rights to a fair trial were violated" because "he was tried by a judge with particular views on religion that intimidated the jurors from exercising their own beliefs" and "[t]he judge also gratuitously interjected race into the trial." We agree.

A. Preservation

¶ 6 **[1]** Defendant acknowledges that he did not object to the trial court's statements during jury selection. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."). Defendant asserts his argument is preserved as a matter of law because the trial court violated North Carolina General Statute § 15A-1222, which prohibits a trial judge from expressing "any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2019); *see also State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) ("A defendant's failure to object to alleged expressions of opinion by the trial court in violation [N.C. Gen. Stat. § 15A-1222 and N.C. Gen. Stat. § 15A-1232] does not preclude his raising the issue on appeal."). Alternatively, in the event this Court deems Defendant's argument was not preserved as a matter of law, Defendant asks this Court to invoke Rule 2 "to suspend the Rules and review the claim of the lack of an atmosphere of judicial calm to prevent the manifest injustice of allowing [Defendant] to be convicted in violation of his rights to a trial before an impartial judge and an unprejudiced jury."

¶ 7 Although the trial court's statements could be construed as opinions on the role African Americans play in the justice system or the teachings of a "Baptist background[,]" the opinions did not go to "fact[s] to be decided by the jury." N.C. Gen. Stat. § 15A-1222. As a result, a remaining

vehicle for this Court to review Defendant's unpreserved argument is Appellate Rule 2:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2. "Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted). Here, noting that "Defendant has sufficiently shown he is entitled to a new trial[,]" the State concedes "that this is one of the narrow circumstances in which it is appropriate for this Court to invoke Rule 2." We agree that this case presents an exceptional circumstance justifying the use of Rule 2. *See id.* As a result, in the exercise of our discretion, we suspend Rule 10(a)(1)'s preservation requirements under Rule 2 and review the merits of Defendant's argument. N.C. R. App. P. 2.

B. Analysis

¶ 8 **[2]** Defendant argues he is entitled to a new trial because the trial court's statements "intimidated the jurors from exercising their beliefs, free will, or judgment throughout the remainder of jury selection and the trial" and "also surprisingly interjected race into this matter."[1] The State concedes that the trial court's statements constitute structural error and Defendant is entitled to a new trial.

> Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.

State v. Garcia, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (internal citations and quotation marks omitted). Structural "error[ ] is reversible

1. We note that the same trial judge made similar comments during jury selection in *State v. Farrior*, COA20-513, filed concurrently with this opinion. However, in *Farrior*, because we vacated the defendant's conviction based on insufficient evidence of the offense charged, we did not substantively address the trial court's comments.

per se." *Id.* The United States Supreme Court has identified six instances of structural error; this case implicates an instance of "a biased trial court judge[.]" *State v. Polke*, 361 N.C. 65, 73, 638 S.E.2d 189, 194 (2006) (citation omitted); *see also State v. Frink*, 158 N.C. App. 581, 587, 582 S.E.2d 617, 620 (2003) ("Structural error may arise by the absence of an impartial judge." (citation omitted)). A biased trial court judge is a structural error requiring a new trial because it is a "well-recognized rule that every person charged with a crime has a right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Cousin*, 292 N.C. 461, 462, 233 S.E.2d 554, 556 (1977) (citation omitted).

¶ 9 The trial court's open court comments encouraging juror participation were specifically directed at African Americans in the venire. These comments appear to reflect the trial court's desire that Defendant—who is African American—have a fair trial by virtue of a representative jury. But "the probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial." *State v. Bryant*, 189 N.C. 112, 114, 126 S.E. 107, 108 (1925). Our Supreme Court has cautioned that

> [m]any decisions have warned that remarks made before prospective jurors must be engaged in with the greatest of care and that the judge must be careful not to make any statement or suggestion likely to influence the decision of the jurors when called upon later to sit in a given case.
>
> . . . .
>
> ". . . The judge should be the embodiment of even and exact justice. He should *at all times* be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance, which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge,' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged."

State v. Carriker, 287 N.C. 530, 533–34, 215 S.E.2d 134, 137–38 (1975) (quoting *Withers v. Lane*, 144 N.C. 184, 56 S.E. 855 (1907)) (emphasis in original).

¶ 10 Further, courts have cautioned that irrelevant references to religion, race, and other immutable characteristics can impede a defendant's right to equal protection and due process. *See Miller v. State of N.C.*, 583 F.2d 701, 707 (4th Cir. 1978) ("One of the animating purposes of the equal protection clause of the fourteenth amendment, and a continuing principle of its jurisprudence, is the eradication of racial considerations from criminal proceedings." (citation omitted)); *see also United States v. Runyon*, 707 F.3d 475, 494 (4th Cir. 2013) ("The Supreme Court has long made clear that statements that are capable of inflaming jurors' racial or ethnic prejudices 'degrade the administration of justice.' Where such references are legally irrelevant, they violate a defendant's rights to due process and equal protection of the laws . . . ." (citation omitted)). Here, the trial court's interjection of race and religion could have negatively influenced the jury selection process. After observing the trial court admonish prospective juror Hairston in an address to the entire venire, other potential jurors—especially African American jurors—would likely be reluctant to respond openly and frankly to questions during jury selection regarding their ability to be fair and neutral, particularly if their concerns arose from their religious beliefs. We hold the trial's statements constituted structural error and award Defendant a new trial.[2]

III. Conclusion

¶ 11 Because the trial court's statements improperly injected race and religion into the voir dire and violated Defendant's right to a trial before an impartial jury, we vacate Defendant's conviction and remand for a new trial.

NEW TRIAL.

Judge TYSON concurs.

Judge DILLON dissents.

DILLON, Judge, dissenting.

¶ 12 Defendant argues that he is entitled to a new trial based on comments made by the trial judge during jury selection ("voir dire") as she

2. Because we award Defendant a new trial, we need not address Defendant's argument that being sentenced as a habitual felon violated his rights to be free of cruel and unusual punishment. However, we note that Defendant's brief acknowledges that "this Court has previously upheld the statutory scheme against an identical challenge and raises this issue in brief to urge the Court to re-examine its prior holdings[.]"

was excusing a potential juror from service. The potential juror, who is African American, stated that he could not sit on a jury based on his Baptist religion. Defendant is also African American. The trial judge, who is also African American, stated that she too was a Baptist and appeared skeptical of the juror's excuse, stating that there was nothing in her faith that prevented her from faithfully serving on a jury, but gave him the benefit of the doubt and excused him. However, as the trial judge was excusing the juror, she directed comments to the remaining African Americans in the jury pool, admonishing them as to their duty to serve and the importance of their willingness to serve to better ensure that African American defendants receive a fair trial.

¶ 13 The majority concludes that the trial judge's comments constituted *structural* error, thus requiring a new trial. I agree with the majority that, though the trial judge may have had good intentions in making her comments, some of her word choice was inappropriate. However, I disagree with the majority that Defendant is entitled to a new trial. I do not believe that the trial judge's comments amounted to *structural* error. In any event, even if her comments did constitute structural error, Defendant failed to preserve any "structural error" or other constitutional argument. And given the low likelihood that the trial judge's comments caused prejudice to Defendant, I would not invoke Appellate Rule 2 to reach the issue. Furthermore, to the extent that the trial judge's comments constituted a non-constitutional error, I do not believe her comments amounted to reversible error. Accordingly, I dissent.

1. Analysis

A. No *Structural* Error

¶ 14 Defendant argues the trial judge's comments during voir dire directed to potential African American jurors constituted *structural* error because they exhibited bias on her part. The State agrees with Defendant. However, I disagree that the comments constituted structural error. While her comments were inartful and some of her word choice was inappropriate, they do not rise to the level of structural error.

¶ 15 Constitutional errors, when preserved, are generally subject to harmless error analysis on appeal. However, our Supreme Court, quoting the United States Supreme Court, has held that certain constitutional errors rise to the level of "structural error" and are "reversible *per se*," without having to engage in any prejudice analysis:

> Structural error is a rare form of constitutional error . . . which [is] so serious that "a criminal trial cannot

> reliably serve its function as a vehicle for determination of guilt or innocence."

State v. Garcia, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). Indeed, the United States Supreme Court differentiates *structural* error from other constitutional errors as follows:

> [T]he defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself.

Weaver v. Massachusetts, ___ U.S. ___, ___, 137 S. Ct. 1899, 1907 (2017) (quotation omitted).

¶ 16 Our Supreme Court and the United States Supreme Court have identified those types of constitutional errors which rise to the level of structural error. One type of structural error, which Defendant states is the error in this case, occurs when the trial is presided over by "a biased trial judge." The case oft cited (and referenced by both parties in their appellate briefs) for the proposition that a biased judge constitutes *structural* error is *Tumey v. Ohio*, 273 U.S. 510 (1927). In that case, the Court stated that when the presiding judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case," he (the defendant) is *per se* denied due process. *Id*. at 523. The Court differentiated such conflicts of interest from mere concerns over "matters of [the trial judge's] kinship, personal bias, state policy, [and] remoteness of interest," stating that these lesser concerns are not constitutional concerns, but rather are "matters merely of legislative discretion." *Id*. at 523.

¶ 17 Here, Defendant does not make any claim that the trial judge had any personal interest in his case. Rather, the crux of Defendant's argument is that the trial judge made inappropriate comments during voir dire that may have caused prospective jurors "from exercising their beliefs, free will, or judgment throughout the remainder of jury selection and the trial."

¶ 18 It may be true that a judge's comments that affect the impartiality of the jury may constitute error, even constitutional error. However, such comments do not constitute "structural error." That is, such comments are not *per se* reversible. Rather, there must be an analysis concerning the prejudice caused by the comments; whether it is the defendant's burden to show that the comments were prejudicial, or the State's burden

to show that the comments were not prejudicial, beyond a reasonable doubt. Defendant cites *State v. Carter* for the proposition that the trial court must be careful in her comments to the jury, but even in that case our Supreme Court recognized that inappropriate comments by the judge are not *per se* reversible:

> The bare possibility, however, that an accused may have suffered prejudice from the conduct or language of the judge is not sufficient to overthrow an adverse verdict. The criterion for determining whether or not the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect of the language upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. This is so because a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

State v. Carter, 233 N.C. 581, 583, 65 S.E.2d 9, 10-11 (1951) (cleaned up). In fact, neither Defendant nor the majority cite to any case for the proposition that the comments of a trial judge which might influence the ability of the jury to remain impartial constitutes "structural" error. Just last year, our Supreme Court engaged in a *prejudicial error* analysis where the alleged error, involving the actions of a trial judge during voir dire, may have resulted in a racially biased jury. *State v. Crump*, 376 N.C. 375, 392, 851 S.E.2d 904, 917-18 (2020) (holding that "the trial court's restrictions on defendant's questioning during voir dire [about prospective juror's racial bias] were prejudicial").

B. Waiver

¶ 19 In any event, Defendant waived his right to assert that the trial judge's comments constituted structural or other constitutional error. Our Supreme Court has recognized that "[s]tructural error, no less than other constitutional error, should be preserved at trial." *Garcia*, 358 N.C. at 410, 597 S.E.2d at 745. The United States Supreme Court also requires structural errors to be preserved for review on appeal. *Johnson v. United States*, 520 U.S. 461, 465-66 (1997).

¶ 20 Here, Defendant had the opportunity to object to the trial judge's comments and ask for a continuance, where a new jury pool would be available, but no objection was made. And Defendant has not articulated

on appeal how manifest injustice would result by our Court refusing to invoke Rule 2 to consider his unpreserved constitutional arguments. There is no showing that the trial judge demonstrated any bias or expressed any bias about Defendant, or his case, or that any juror was biased against Defendant by her comments. Further, I do not perceive the trial judge's comments as a means of coercing prospective jurors to be *dishonest* in their voir dire answers. Rather, she was admonishing just the opposite—for the jurors to be honest about whether their objection to sitting on the jury was truly based on a religious reason.

¶ 21 I note Defendant's contention that his argument concerning the trial judge's comments are otherwise preserved because the comments violated the statutory mandate codified in Section 15A-1222 of our General Statutes. This statute provides that the trial judge "may not express during any stage of the trial any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2019). I do not believe, however, that this statute has been implicated, as Defendant does not make any argument that the trial judge's comments had any relation to any question of fact that the jury was to decide in his case. Rather, her comments only concerned jury service and ensuring that African American defendants receive a fair trial.

C. No Reversible Error

¶ 22 A trial judge has broad discretion in addressing potential jurors during voir dire to admonish them to be honest in their answers to questions. Though, I do agree with my colleagues that some of the word choice by the trial judge here was inappropriate.

¶ 23 First, the trial judge should not have directed comments to just the African Americans in the jury pool about the importance of jury service, but she should have directed her comments more generally to the jury pool as a whole.

¶ 24 Second, she should have been more careful in her word choice when she suggested that she was among those who felt that the judicial system is not fair to African American defendants, by stating: "Everyday *we* are in the newspaper stating we don't get fairness in the judicial system. Every single day. But none of *us* – most African Americans do not want to serve on a jury." (Emphasis added.)

¶ 25 Third, she should not have injected race by stating an irrelevant statistic that ninety percent (90%) of defendants are African Americans.

¶ 26 Assuming we were to reach Defendant's arguments concerning the trial judge's inappropriate comments, I do not see how the comments

were prejudicial against Defendant. I do not see any likelihood that someone remained on the jury who abandoned his/her presumption that Defendant was innocent based on anything the trial judge said. The trial judge never made any comment suggesting that Defendant was guilty but rather that Defendant was entitled to jurors who could be fair in assessing the case against him. Also, I do not see any likelihood that her comments caused someone to be seated on the jury who was prejudiced against Defendant, who would have otherwise spoken up about his/her prejudice but for the trial judge's comments.

¶ 27 The trial judge's comments, taken at face value, admonished the African Americans in the jury pool to be honest in advising the attorneys about their ability to be fair and impartial in their service.

II. Conclusion

¶ 28 Though the trial judge may have had good intentions, in my opinion she did cross the line in her word choice during voir dire. I do not believe, however, that her comments constituted structural error. Defendant's arguments, whether based on the constitution or on N.C. Gen. Stat. § 15A-1222, are not preserved; and her comments were not egregiously prejudicial *against* Defendant—if prejudicial against him at all—to warrant invocation of Rule 2 of our Rules of Appellate Procedure.

¶ 29 Accordingly, I conclude Defendant had a fair trial, free from reversible error. This includes the trial court's sentencing of Defendant as a habitual felon. My vote is NO ERROR.

STATE v. HEGGS

[280 N.C. App. 95, 2021-NCCOA-564]

STATE OF NORTH CAROLINA
v.
BARROD HEGGS, DEFENDANT

No. COA20-862

Filed 19 October 2021

Sentencing—aggravating factors—stipulated—supporting evidence —same as evidence of elements of crime

The trial court erred by finding two of three stipulated aggravating factors in sentencing defendant upon his guilty plea for felony death by motor vehicle where the only evidence supporting the two erroneous aggravating factors—that the victim was killed in the collision and that defendant was armed with deadly weapon (a vehicle)—was the same evidence supporting the elements of the crime. Defendant's plea agreement was vacated and remanded for a new disposition.

Appeal by Defendant from judgment entered 14 December 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.

Aberle & Wall, by A. Brennan Aberle, for the Defendant.

GRIFFIN, Judge.

¶ 1 Defendant Barrod Heggs appeals from a judgment entered upon his guilty plea to the charge of felony death by motor vehicle. Defendant argues the trial court erred by sentencing him in the aggravated range because the evidence supporting three stipulated factors in aggravation was the same as the evidence supporting the elements of felony death by motor vehicle. Upon review, we conclude that the trial court erred in finding two aggravating factors. We vacate Defendant's sentence and plea agreement and remand for a new disposition.

I. Factual and Procedural Background

¶ 2 During the early morning hours on 24 February 2018, Trooper Clay with the North Carolina State Highway Patrol responded to a collision between two vehicles on Interstate 540. The crash "involved a white

Dodge Challenger[,]" operated by Defendant, and a "white sport[] utility vehicle." The driver of the SUV was killed during the collision. When Trooper Clay arrived on scene, Defendant was standing by his vehicle and "admitted to driving." "Trooper Clay noticed a strong odor of alcohol coming from [Defendant's] breath and noticed that [Defendant] displayed red and glassy eyes."

¶ 3 "Trooper Clay had [Defendant] perform some standardized field sobriety tests" and administered "two portable breath tests[,]" both of which indicated that Defendant's blood alcohol content exceeded the legal limit. Defendant was subsequently arrested for driving while impaired. Defendant refused to comply with additional testing, at which point "a search warrant was obtained for [a] blood" sample. A test of that sample measured Defendant's blood alcohol content as 0.13.

¶ 4 "As the North Carolina State Highway Patrol continued [its] investigation, [it] learned from multiple witnesses that . . . [D]efendant was travelling at speeds estimated in excess of 120 miles per hour prior to the crash." "There were 911 calls placed by concerned drivers [who] questioned, . . . due to [Defendant's] speed[,]" "maneuvering" and "weaving in and out of traffic, whether [what they witnessed] was actually a high-speed chase by the State Highway Patrol." "A CDR download, which is effectively the black box of the vehicle, was performed and showed that there was no deceleration by [Defendant] prior to [the crash] and that [Defendant] was going at speeds in excess of 98 miles per hour at the point of impact[.]"

¶ 5 A Wake County grand jury indicted Defendant on one count of felony death by motor vehicle. Defendant pled guilty to driving while impaired and felony death by motor vehicle. Pursuant to a plea agreement with the State, Defendant stipulated to the existence of the following aggravating factors for sentencing purposes: (1) "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person"; (2) Defendant "was armed with a deadly weapon at the time of the crime"; and (3) "[t]he victim of th[e] offense suffered serious injury that is permanent and debilitating." Defendant further stipulated that he was a Record Level I for sentencing purposes. The State agreed not to seek an indictment for second-degree murder as a condition of the plea agreement.

¶ 6 The trial court entered a judgment upon Defendant's plea of guilty to felony death by motor vehicle and arrested judgment on the charge of driving while impaired. The court found the three aggravating factors to which Defendant stipulated, as well as five mitigating factors, and

sentenced Defendant in the aggravated range. Defendant subsequently filed a petition for writ of certiorari with this Court seeking review of the trial court's judgment, which was granted.

II. Analysis

¶ 7 Defendant argues that the trial court erred by sentencing him in the aggravated range because the evidence supporting the three aggravating factors was the same as the evidence supporting the elements of felony death by motor vehicle. We agree that the trial court erred in finding two of the three aggravating factors. Because Defendant stipulated to the existence of these factors in his plea agreement with the State and now seeks to repudiate this part of the agreement, we vacate the trial court's judgment, as well as the plea agreement between the State and Defendant, and remand for a new disposition.

¶ 8 N.C. Gen. Stat. § 15A-1340.16(a1) provides that a "defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury[.]" N.C. Gen. Stat. § 15A-1340.16(a1) (2019). When "aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence" in the aggravated range. *Id.* § 15A-1340.16(b). However, "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation[.]" *Id.* § 15A-1340.16(d).

¶ 9 The essential elements of felony death by motor vehicle are that the defendant (1) "unintentionally cause[d] the death of another person"; (2) "was engaged in the offense of impaired driving"; and (3) "[t]he commission of the [impaired driving] offense . . . [was] the proximate cause of the death." *Id.* § 20-141.4(a1) (2019).

¶ 10 In this case, the trial court found the following aggravating factors at sentencing: (1) "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person"; (2) Defendant "was armed with a deadly weapon at the time of the crime"; and (3) "[t]he victim of th[e] offense suffered serious injury that is permanent and debilitating." The only evidence available to support factor (3) is that the victim was killed in the collision caused by Defendant. Because this is also an essential element of felony death by motor vehicle, the trial court erred in finding this aggravating factor. Similarly, the only evidence to support factor (2)—that Defendant "was armed with a deadly weapon at the time of the crime"—is that Defendant was

driving a vehicle when the crime occurred. Because felony death by motor vehicle requires that a defendant be engaged in impaired driving, evidence that Defendant was driving a vehicle cannot also be used to support factor (2).

¶ 11 With respect to factor (1), we conclude that the trial court did not err in finding that "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." There is ample evidence in the Record supporting this factor, none of which was required in order to find Defendant guilty of felony death by motor vehicle. When summarizing the factual basis supporting Defendant's conviction, the prosecutor stated that the North Carolina State Highway Patrol "learned from multiple witnesses that . . . [D]efendant was travelling at speeds estimated in excess of 120 miles per hour prior to the crash." "There were 911 calls placed by concerned drivers [who] questioned, . . . due to [Defendant's] speed[,]" "maneuvering" and "weaving in and out of traffic, whether [what they witnessed] was actually a high-speed chase by the State Highway Patrol." "A CDR download, which is effectively the black box of the vehicle, was performed and showed that there was no deceleration by [Defendant] prior to [the crash] and that [Defendant] was going at speeds in excess of 98 miles per hour at the point of impact[.]"

¶ 12 Evidence of excessive speed and reckless driving is not required in order to prove any of the essential elements of felony death by motor vehicle. In response to the State's summary of the facts, Defendant's counsel stated, "No additions, deletions or corrections to that statement, [y]our Honor. We understand that [this] is what would be introduced if we had chosen to go to trial. There's no correction[] to the way it was read." Accordingly, the trial court did not err in finding that "[D]efendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person."

III. Remedy

¶ 13 With respect to the appropriate remedy, Defendant requests that we "remand for resentencing . . . or, in the alternative, vacate the plea."

¶ 14 "The general rule is that a judgment is presumed to be valid and will not be disturbed absent a showing that the trial judge abused his discretion. When the validity of a judgment is challenged, the burden is on the defendant to show error amounting to a denial of some substantial right." *State v. Bright*, 301 N.C. 243, 261, 271 S.E.2d 368, 379–80 (1980).

> The presumption of lower court correctness and the wide discretion afforded our trial judges in rendering judgment is of necessity grounded on the theory that a trial judge who has participated in the actual disposition of the case [is] . . . in the best position to determine appropriate punishment for the protection of society and rehabilitation of the defendant.

State v. Harris, 27 N.C. App. 385, 387, 219 S.E.2d 306, 307 (1975) (citation and internal quotation marks omitted).

¶ 15 Our Structured Sentencing Act reflects this presumption by vesting discretion in our trial courts to impose an appropriate sentence. This includes the discretion to deviate from the presumptive term and instead sentence a defendant in the aggravated or mitigated range: "The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a). "If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range[.]" *Id.* § 15A-1340.16(b). This is true regardless of whether the trial judge finds only one factor in aggravation or several. *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502 (1985) ("[A] sentencing judge need not justify the weight he or she attaches to any factor. A sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa.").

¶ 16 Although the trial court in this case erred in finding two aggravating factors, it correctly found one aggravating factor. Were we to remand this matter for resentencing, the trial court would have the discretion to reimpose the same sentence that it originally deemed appropriate. The factual basis for the plea has not changed. The judge would make his sentencing decision based on the same evidentiary presentation, regardless of whether the additional factors are found or not.

¶ 17 We therefore discern no prejudice to Defendant resulting from the trial court's erroneous finding of the two aggravating factors. Nonetheless, our Supreme Court has held that "in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983). We are thus bound by precedent to, at

a minimum, vacate Defendant's sentence. However, because Defendant stipulated to the existence of the aggravating factors in his plea agreement with the State and now seeks to repudiate this part of the agreement, we are further required to vacate the plea agreement and remand for a new disposition rather than remand for a new sentencing hearing. *See State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

¶ 18 In *Rico*, the defendant was charged with first-degree murder. *Id.* at 110, 720 S.E.2d at 802. Pursuant to a plea agreement with the State, the defendant pled guilty to voluntary manslaughter and stipulated to the existence of an aggravating factor for sentencing purposes. *Id.* The trial court accepted the agreement and sentenced the defendant in the aggravated range. *Id.* at 111, 720 S.E.2d at 802. The defendant then appealed to this Court, challenging the aggravating factor as well as his aggravated sentence. *Id.* at 111, 720 S.E.2d at 802. However, because the defendant sought to repudiate the portion of the plea agreement in which he stipulated to the aggravating factor, "the entire plea agreement" was vacated. *Id.* at 122, 720 S.E.2d 809 (Steelman, J., dissenting) ("In the instant case, essential and fundamental terms of the plea agreement were unfulfillable. Defendant has elected to repudiate a portion of his agreement. Defendant cannot repudiate in part without repudiating the whole.").

¶ 19 As in *Rico*, Defendant seeks to repudiate the portion of his agreement with the State in which he stipulated to the existence of aggravating factors while retaining the portions which are more favorable; namely, his plea of guilty to felony death by motor vehicle in exchange for the State's agreement to not seek an indictment on the charge of second-degree murder. "Defendant cannot repudiate in part without repudiating the whole." *Id.*; *see also State v. Fox*, 34 N.C. App. 576, 579, 239 S.E.2d 471, 473 (1977) ("Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge."). We therefore vacate Defendant's plea agreement in its entirety and remand for a new disposition.

IV. Conclusion

¶ 20 For the foregoing reasons, we vacate the judgment entered upon Defendant's conviction and remand for a new disposition.

VACATED AND REMANDED.

Judges TYSON and CARPENTER concur.

STATE v. NEAL

[280 N.C. App. 101, 2021-NCCOA-565]

STATE OF NORTH CAROLINA
v.
CHRISTOPHER NEAL

No. COA20-915

Filed 19 October 2021

1. Appeal and Error—preservation of issues—jury instructions—different objection asserted on appeal—reviewed for plain error

Where defendant asserted a different ground on appeal for the objection he lodged at the trial court for its jury instruction on constructive possession (in a trial for possession of a firearm by a felon and other offenses), he failed to preserve his argument for appeal. However, since he clearly contended the instruction amounted to plain error, he was entitled to plain error review.

2. Criminal Law—jury instructions—constructive possession—possession of firearm by felon—pattern instruction used

In a trial for possession of a firearm by a felon and other offenses, the trial court did not err, much less plainly err, when it instructed the jury on constructive possession during the introductory general instructions or when it instructed the jury on the specific elements of possession of a firearm by a felon. The court followed the pattern jury instructions and gave an accurate statement of the law.

3. Appeal and Error—preservation of issues—jury instructions—no objection—reviewed for plain error

Defendant's challenge to the trial court's jury instruction on attempted first-degree murder did not constitute invited error where, although defendant requested an instruction, the trial court made an alteration before relating it to the jury, but defendant's failure to object to the instruction as given did not preserve the issue for appellate review. However, since he clearly contended the instruction amounted to plain error, he was entitled to plain error review.

4. Criminal Law—jury instructions—attempted first-degree murder—malice could not by inferred from evidence—no plain error

Defendant failed to demonstrate plain error in the trial court's jury instructions on attempted first-degree murder, which included a statement that the jury could infer that defendant acted unlawfully

and with malice if it found that he intentionally inflicted a wound upon the victim with a deadly weapon. Defendant could not show that the instruction had a probable impact on the guilty verdict where, even though there was no evidence that the victim was physically wounded during the shooting that led to the charges and therefore the jury could not have inferred that defendant acted unlawfully and with malice on that basis, the jury was presumed to follow the court's instructions.

5. Constitutional Law—right to speedy appeal—Barker factors—ten extensions of time to produce trial transcript for appeal

A defendant whose appeal from his convictions was delayed by a year because the court reporter requested ten extensions of time to produce the trial transcript failed to demonstrate that his constitutional right to a speedy trial was violated where, pursuant to the factors in *Barker v. Wingo*, 407 U.S. 514 (1972), the delay was due to neutral factors, defendant did not assert his right to a speedy appeal prior to his appellate brief, and, despite asserting additional stress due to being incarcerated during a pandemic, defendant did not otherwise show prejudice from the delay.

Appeal by Defendant from judgments entered 26 June 2019 by Judge David T. Lambeth Jr. in Alamance County Superior Court. Heard in the Court of Appeals 24 August 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Mary Carla Babb, for the State-Appellee.

Meghan Adelle Jones for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant Christopher Neal appeals from judgments entered upon jury verdicts of guilty of discharging a weapon into an occupied moving vehicle, assault with a deadly weapon with intent to kill, attempted first-degree murder, and possession of a firearm by a felon. Defendant argues that the trial court erred in its instructions on constructive possession and attempted first-degree murder, and that his due process rights were violated by a year-long delay in processing his appeal. We discern no error, much less plain error, in the constructive possession instruction; no plain error in the attempted first-degree murder instruction; and no violation of Defendant's due process rights.

I. Factual and Procedural Background

¶ 2 Defendant was indicted for discharging a weapon into a moving vehicle, assault with a deadly weapon with intent to kill, attempted first-degree murder, and possession of a firearm by a felon. The case came on for trial on 10 June 2019.

¶ 3 The evidence at trial tended to show the following: Carliethia Glover, a social worker for Rockingham County Department of Social Services ("DSS"), received a report from Child Protective Services ("CPS") on 12 June 2017 that a premature infant, whose umbilical cord had tested positive for the presence of marijuana, had recently been born at a hospital in Greensboro. The infant is the child of Defendant and Latonya Whetsell. Glover and her colleague Emily Pulliam visited the infant on 13 June 2017 at the hospital. Glover and Pulliam then travelled to Reidsville to the parents' address listed on the CPS report. At the listed address, Glover and Pulliam encountered Wilbert Neal ("Wilbert"), Defendant's father. Wilbert told Glover that Defendant and Whetsell sometimes lived at his home, but were not living there at that time. Wilbert directed them "around the corner" to a mobile home, which he owned and in which he allowed the couple to stay with their children. Unable to locate the mobile home, Glover called the telephone number listed on the CPS report for Whetsell. When Whetsell answered, Glover told Whetsell that Glover would need to see Whetsell's two other children that day.[1] Whetsell was angry and said, "get this phone before I have to cuss her out." Defendant got on the phone and told Glover that she would not be seeing his children. Glover then gave Pulliam the phone. Defendant yelled at Pulliam, "I'm going to see your M[other] F[***ing] punk A[**]."

¶ 4 As Glover and Pulliam continued driving through the neighborhood, Pulliam spotted a man, whom they later determined was Defendant, outside on the phone. Shortly thereafter, Glover and Pulliam noticed a blue BMW SUV following them. The BMW chased them down a highway, into a parking lot, and down a street. Pulliam saw a black male, whom she recognized as the same man who had been outside on the phone, "holding something up towards the car," but could not tell "at that point in time what was being pointed at us." Eventually they lost the BMW in traffic, and Glover stopped to telephone law enforcement.

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1. Whetsell has three children with Defendant, including two who lived with Whetsell and the premature infant. Whetsell also has three children who were not fathered by Defendant and who had previously been taken into custody by DSS. Whetsell had not been cooperative in the agency's efforts to return them to her.

¶ 5 After the chase had ended, Defendant appeared at DSS and confronted social worker Jan Odum about the agency's involvement with his children. Odum had previously been involved with Whetsell when Odum was the foster care social worker for Whetsell's three oldest children. At trial, Odum characterized Defendant's demeanor that day as "angry," "loud," "menacing," and "threatening." A detective who worked at DSS was able to calm Defendant down, and Melissa Kaneko, Glover's supervisor at DSS, explained DSS's involvement to Defendant. Defendant told DSS that he and Whetsell were no longer a couple and suggested that she had previously made false allegations against him.

¶ 6 According to Whetsell's testimony, her relationship with Defendant had been tumultuous. During one argument, Defendant pistol-whipped her in the head with a nine-millimeter handgun that belonged to her. She received staples in her head as a result. She testified at trial that it was Defendant who had hit her and that she had refused to tell police who had hit her because she did not want him to get into trouble. During another argument, Defendant chased her on a highway in his car and pointed the handgun at her.

¶ 7 After the chasing incident, Whetsell sought a Chapter 50B domestic violence protective order against Defendant. In her 50B complaint, Whetsell detailed the above altercations. Additionally, she took out a warrant for Defendant's arrest for assault by pointing a gun. Whetsell did not pursue the 50B order because she "really didn't want him in trouble," and the assault charge was dismissed when she failed to appear in court.

¶ 8 The same afternoon that Glover and Pulliam had attempted to visit Defendant and Whetsell at the mobile home, Glover and Pulliam returned to DSS and discussed with staff members what to do about Whetsell's two children who remained in her care. Because there had been a previous 50B complaint filed against Defendant, it was decided that Glover needed to speak to Whetsell and see the children that same day, and, if Whetsell confirmed the allegations against Defendant were true, that the children should not remain in the home that night. Accompanied by law enforcement officers, Glover and Pulliam drove a county car to the mobile home.

¶ 9 Glover asked Whetsell about her drug use and any incidents between her and Defendant that might make the home dangerous. Whetsell claimed there had been "some kind of misunderstandings" between Defendant and her, and confirmed that someone did pistol-whip her, but claimed it was not Defendant and that she was just confused. Whetsell testified at trial, however, that the allegations in her 50B complaint about

him were true, but that she had lied to Glover to "protect" Defendant and keep DSS from taking her children.

¶ 10 Glover asked Whetsell if there was a relative or friend with whom the children could stay temporarily. Whetsell replied that her children were not going anywhere. Glover telephoned Kaneko, who asked the DSS attorney to move for temporary custody of the children. Upon this motion, a judge issued an order for nonsecure custody.

¶ 11 While Glover and Pulliam were still at the mobile home, Defendant arrived. Pulliam testified that she recognized Defendant as the same man who had chased her and Glover earlier that day. Defendant cursed and shouted at Glover and the law enforcement officers as Glover put the children into the car. Video from a body camera worn by one of the officers captured Defendant saying while facing Glover, "You might die tonight." Defendant asked Glover where she was taking the children, and Glover replied that she could not disclose that information. Glover drove to the Rockingham County Sheriff's Department to retrieve the non-secure custody order. Defendant and Whetsell also drove to the Sheriff's Department in his BMW. Glover and Pulliam, now accompanied by Sheriff's Deputy Carter, then drove to a foster home agency in Guilford County to drop off the children.

¶ 12 Around 10:30 p.m., Glover and Pulliam returned to DSS to retrieve their personal vehicles. Soon thereafter, Defendant and Whetsell arrived in Defendant's BMW. Deputy Carter told them to leave. After they left, Glover and Pulliam began driving to their respective homes, each with a law enforcement escort. Pulliam made it safely home. The officer escorting Glover home to Burlington followed her to the Rockingham County line, where he turned around.

¶ 13 At some point, Defendant and Whetsell returned to the mobile home and retrieved Whetsell's nine-millimeter loaded handgun. Whetsell put the gun in her purse. Whetsell testified that she assumed Defendant knew she had the handgun in her purse because she usually kept it with her.

¶ 14 Defendant and Whetsell left the mobile home and began driving on Highway 87 toward Burlington, the same direction Glover was driving. Whetsell testified that they were not initially following Glover but were on their way to Raleigh to hire a lawyer. Whetsell recognized Glover's car and directed Defendant, who was driving, to follow Glover. Whetsell testified that Defendant followed Glover because he knew that Whetsell was angry and "wanted to get at" one of the DSS social

workers. As Defendant and Whetsell neared Glover's car, Whetsell took her handgun out of her purse and set it on her lap.

¶ 15 Defendant followed Glover into a parking lot. While Defendant was chasing Glover around the parking lot, Whetsell fired her handgun at Glover, shattering the driver's side rear window of Glover's car. Whetsell testified that when shooting at Glover, she wanted to hit her. Whetsell did not hit Glover, however, and Glover was physically uninjured. Glover called 911 and drove to the Burlington police station. Glover identified Defendant by name to the police as the person who had shot at her.

¶ 16 After the shooting, Defendant dropped Whetsell off in a nearby neighborhood. Whetsell took her purse, with the handgun inside, with her. Whetsell told Defendant to return to Reidsville and switch out his car for hers. Defendant drove to Reidsville where he switched his BMW with a car that Whetsell did not recognize and returned to Burlington to pick up Whetsell. The couple then drove to Reidsville, intending to switch the car with Whetsell's car, but their house was surrounded by law enforcement. They retrieved Defendant's BMW instead. Whetsell testified that Defendant disposed of the handgun "somewhere in Reidsville." Law enforcement never recovered it.

¶ 17 Defendant and Whetsell drove to Myrtle Beach, South Carolina. On or about 15 June, South Carolina law enforcement arrested them and they were brought back to North Carolina.

¶ 18 Defendant testified and maintained throughout trial that he was not in the car when Whetsell shot at Glover. According to Defendant, he was in Reidsville at the time caring for his great aunt. Defendant's cousin Alexis Slade testified that she was with Defendant at their great aunt's house on the night of the shooting and was there with Defendant around 10:00 p.m. when they put their aunt to bed and when she went to bed herself. Defendant's cousin Monique Barnett testified that Whetsell told Barnett she was solely responsible for the shooting.

¶ 19 Whetsell pled guilty to assault with a deadly weapon with intent to kill and discharging a firearm into an occupied moving vehicle, and agreed to testify truthfully against Defendant.[2] In exchange, the State dropped the attempted first-degree murder charge against her. During trial, the State introduced a certified copy of Defendant's federal court records showing felony convictions for distributing cocaine.

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2. While awaiting trial, Whetsell signed an unsworn statement wherein she claimed she acted alone when she shot at Glover. Whetsell later testified the statement was false.

¶ 20 The jury returned guilty verdicts on all charges.

¶ 21 The trial court entered judgments upon the jury's verdicts, sentencing Defendant to consecutive prison terms of 180 to 228 months for attempted first-degree murder, 73 to 100 months for discharging a weapon into an occupied moving vehicle, 29 to 47 months for assault with a deadly weapon with intent to kill, and 14 to 26 months for possession of a firearm by a felon. Defendant appealed.

II. Discussion

¶ 22 Defendant contends the trial court erred in its instruction on constructive possession, the trial court erred in its instruction on attempted first-degree murder, and that his due process rights were violated by a year-long delay in processing his appeal.

A. Constructive Possession Instruction

¶ 23 Defendant first argues that "[t]he trial court erred or plainly erred by instructing on constructive possession of a firearm by a felon, when that theory was not supported by the evidence." Defendant mischaracterizes the instruction he challenges, and his argument is without merit.

1. Preservation

¶ 24 **[1]** As a threshold matter, we address the State's contention that Defendant argued a different ground for his objection at trial than he does on appeal and thus, the argument he makes on appeal is unpreserved. We agree.

¶ 25 During the charge conference, the court engaged the parties in a lengthy discussion about the constructive possession instruction. Defendant, through standby counsel,[3] objected to the instruction, stating, "For the offense of possession of a firearm by a felon has to be actual physical possession. . . . So we object to a constructive possession charge in toto, since the actual possession is covered in the offense of possession of a firearm by a felon." Defendant now argues that because no firearm was found in this case, the constructive possession instruction was unsupported by the evidence.

¶ 26 Our courts have long held that where a theory argued on appeal was not raised before the trial court, "the law does not permit parties to swap horses between courts in order to get a better mount . . . ." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). Defendant's

3. Defendant represented himself at trial with an attorney as standby counsel. With the consent of Defendant, standby counsel acted as counsel during the charge conference.

argument that the constructive possession instruction was unsupported by the evidence, made for the first time on appeal, is not preserved for our review. However, as Defendant "specifically and distinctly" contends the instruction amounted to plain error, we review for plain error. N.C. R. App. P. 10(a)(4).

¶ 27 To show plain error, Defendant must demonstrate that a fundamental error occurred at trial. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice— that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.*

2. Analysis

¶ 28 **[2]** The trial court instructed the jury on constructive possession in conformity with N.C.P.I. Crim–104.41 as follows:

> If you find beyond a reasonable doubt that an article was found in close proximity to the defendant, that would be a circumstance from which, together with other circumstances, you may infer that the defendant was aware of the presence of the article and had the power and intent to control its disposition or use.

¶ 29 Defendant first erroneously argues that this instruction was given "[a]s part of the instruction on possession of a firearm by a felon[.]" It was not. This instruction was given as part of the introductory general instructions–which included, among others, instructions on the presumption of innocence, the definition of reasonable doubt, and the jury members as the sole judges of credibility–preceding specific instructions on the specific charges Defendant faced. Defendant also erroneously argues that "[t]he trial court erred by instructing the jury that Mr. Neal's possession of the firearm could be inferred from its being found in close proximity to the defendant's person." The trial court did not so instruct. The above general instruction on constructive possession does not reference a firearm; it is a correct statement of the law of constructive possession and refers generally to "an article." *See State v. Bradshaw*, 366 N.C. 90, 93-94, 728 S.E.2d 345, 348 (2012) ("It is well established that possession may be actual or constructive. . . . A defendant constructively possesses contraband when he or she has the intent and capability to maintain control and dominion over it." (quotation marks and citations omitted)).

¶ 30 The entirety of the trial court's specific instruction on possession of a firearm by a felon, which appears more than seven transcript pages after the general constructive possession instruction, is as follows:

> The defendant has been charged with possessing, having within defendant's custody, care, control a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> That on December 9, 2009 in United States District Court for the Middle District of North Carolina, the defendant was convicted of the felony of conspiracy to distribute crack cocaine and distribution of crack cocaine that was committed between 1988 up to and including December 19, 1994 in violation of the laws of the United States.
>
> And second, that after December 9, 2009, the defendant possessed, had within defendant's custody, care, control a firearm.

This instruction conforms with N.C.P.I.–Crim 254A.11, possession of a firearm by a felon, is an accurate statement of the law, and is supported by the evidence. *See Bradshaw*, 366 N.C. at 93, 728 S.E.2d at 347-48 ("To convict defendant of possession of a firearm by a felon the state must prove that (1) defendant was previously convicted of a felony and (2) subsequently possessed a firearm.") (citing N.C. Gen. Stat. § 14-415.1(a)). The trial court did not err, much less plainly err, in its instruction on constructive possession or its instruction on possession of a firearm by a felon.

¶ 31 Moreover, even if the inclusion of a general constructive possession instruction was given in error, after a review of the entire record, we cannot say that the challenged jury instruction "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Defendant's argument is overruled.

B. Attempted First-Degree Murder Instruction

¶ 32 Defendant next argues that the trial court erred when it instructed the jury on attempted first-degree murder, in conformity with N.C.P.I.–Crim 206.17A, that it could infer that the defendant acted unlawfully and with malice if it found that "the defendant intentionally inflicted a wound upon the victim with a deadly weapon."

1. Preservation

¶ 33 **[3]** The State argues Defendant invited any error and waived appellate review by affirmatively approving of the contents of the instruction he now challenges. Defendant argues he sufficiently objected at trial to the instruction, or, in the alternative, he specifically and distinctly contends on appeal that the instruction amounted to plain error.

¶ 34 With regard to invited error, "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991). In *State v. Wilkinson*, 344 N.C. 198, 474 S.E.2d 375 (1996), defendant submitted a proposed jury instruction in writing to the trial court. The trial court changed one word in the instruction, and defendant stated that he had no objection to this change. *Id.* at 213, 474 S.E.2d at 383. On appeal, defendant argued that the instruction was erroneous. Explaining that the Supreme Court "has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests[,]" the Court concluded that defendant had invited the error by actively requesting the court to include an instruction that he later claimed prejudiced him. *Id.*

¶ 35 In this case, Defendant did not request the jury instruction he now challenges on appeal. Accordingly, Defendant did not invite error or waive appellate review of this issue. Defendant did, however, fail to properly object to the instruction, raising only a vague question as to its contents during the charge conference. A short time later, the court asked if Defendant was satisfied with the substantive law provided in the instruction; Defendant, through standby counsel, responded, "[I]t's a pattern jury instruction, and I'm sure it's been looked at by people much smarter than me." Defendant did not object further. Accordingly, Defendant has failed to preserve the issue for appellate review. As Defendant "specifically and distinctly" contends the instruction amounted to plain error, we review for plain error. N.C. R. App. P. 10(a)(4).

2. Analysis

¶ 36 **[4]** The trial court included the following instruction on attempted first-degree murder in conformity with N.C.P.I.–Crim 206.17A:

> The defendant has been charged with attempted first degree murder. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.

> First, that the defendant intended to commit first degree murder.
>
> And second, that at the time the defendant had this intent, he performed an act which was calculated and designed to accomplish the crime, but which fell short of the completed crime. Mere preparation or mere planning is not enough to constitute such an act, but the act need not be the last act required to complete the crime.
>
> First degree murder is the unlawful killing of a human being with malice, with premeditation[,] and with deliberation. Malice means not only ill will or spite, as it is ordinarily understood, to be sure that is malice. But it also means the condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in her death without just cause, excuse or justification.
>
> If the state proves beyond a reasonable doubt that the *defendant intentionally inflicted a wound upon the victim with a deadly weapon*, you may infer first, that the defendant acted unlawfully and second, that it was done with malice, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the defendant acted unlawfully and with malice.

(Emphasis added).

¶ 37 Defendant contends that the instruction was erroneous because no evidence at trial supported that Glover was physically wounded during the shooting. Defendant further argues that the instruction rises to the level of plain error in that it allowed the jury to infer malice, an essential element of first-degree murder, from circumstances not supported by the evidence. Even if the instruction introduced an extraneous matter and was thus given in error, Defendant has failed to show that the error had a probable impact on the jury's finding that the defendant was guilty.

¶ 38 The instruction placed the burden on the State to "prove[] beyond a reasonable doubt" that Defendant intentionally inflicted a wound upon Glover with a deadly weapon before the jury was permitted to infer that

Defendant acted unlawfully and with malice. As Defendant points out, there was no evidence before the jury that Glover was wounded during the shooting. As the State could not meet its burden of proving that Defendant intentionally inflicted a wound upon Glover, the jury was not permitted to infer that Defendant acted unlawfully and with malice. We assume the jury followed the court's instructions. *See State v. White*, 343 N.C. 378, 389, 471 S.E.2d 593, 599 (1996).

¶ 39 After examination of the entire record, we cannot say that challenged jury instruction "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. Accordingly, the trial court's instruction on attempted first-degree murder was not plainly erroneous.

C. Due Process Right to a Speedy Appeal

¶ 40 **[5]** Finally, Defendant argues that he was deprived of his constitutional due process right to a speedy appeal when the court reporter requested ten extensions of time to produce the trial transcript.

1. Standard of Review

¶ 41 We review alleged violations of constitutional rights de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

2. Analysis

¶ 42 For speedy appeal claims, "undue delay in processing an appeal *may* rise to the level of a due process violation." *State v. China*, 150 N.C. App. 469, 473, 564 S.E.2d 64, 68 (2002) (quotation marks and citation omitted). In determining whether a defendant's constitutional due process rights have been violated by a delay in processing an appeal, we consider the following factors as set out in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972): "(1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy appeal; and (4) any prejudice to defendant." *China*, 150 N.C. App. at 473, 564 S.E.2d at 68 (citing *State v. Hammonds*, 141 N.C. App. 152, 158, 541 S.E.2d 166, 172 (2000)). No one factor is dispositive; the factors are related and are considered with other relevant circumstances. *Id.*

a. Length of Delay

¶ 43 "[L]ower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652, n. 1 (1992). The one-year delay in processing Defendant's appeal is thus sufficient to trigger review of

the remaining *Barker* factors. *Hammonds*, 141 N.C. App. at 164, 541 S.E.2d at 175.

b. Reason for Delay

¶ 44 "[T]he burden is on the defendant to show the delay resulted from intentional conduct or neglect by the State." *State v. Berryman*, 360 N.C. 209, 220, 624 S.E.2d 350, 358 (2006). Even if none of the delay is attributable to defendant, that does not necessarily make the delay attributable to the State. *See Hammonds*, 141 N.C. App. at 164, 541 S.E.2d at 176. In *Hammonds*, as here, defendant argued that he had been denied a timely appeal due to the court reporter's delay in finishing the transcript. *Id.* at 164, 541 S.E.2d at 175. This Court stated, "Although none of the delay is attributable to defendant, in light of the fact that this Court consistently approved the reporter's requests for extensions of time, we are equally unable to find that the delay is attributable to the prosecution." *Id.* at 164, 541 S.E.2d at 176. As in *Hammonds*, the delay in this case was due to neutral factors, and Defendant failed to carry his burden to show delay due to neglect or willfulness of the State. *See id.* at 161, 541 S.E.2d at 174. Accordingly, the court reporter's delay in the instant case does not weigh in Defendant's favor with respect to the second *Barker* factor.

c. Defendant's Assertion of the Right

A defendant's assertion of his speedy appeal right "is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Id.* at 162, 541 S.E.2d at 174 (quoting *Barker*, 407 U.S. at 531-32). Conversely, a defendant's failure to assert a violation of his due process rights will not foreclose his claim, but does weigh against him. *Id.* (citing *State v. Flowers*, 347 N.C. 1, 28, 489 S.E.2d 391, 407 (1997)). Nothing in the record before us indicates that Defendant asserted his right to a speedy appeal prior to his brief on appeal. Defendant states in his brief that he "has frequently communicated with undersigned counsel and has repeatedly expressed his desire that his appeal be pursued." However, his failure to formally and affirmatively assert his speedy appeal right weighs against his contention that he has been unconstitutionally denied a speedy appeal. *See State v. Webster*, 337 N.C. 674, 680, 447 S.E.2d 349, 352 (1994).

d. Prejudice to Defendant

¶ 45 Finally, we consider Defendant's allegations of prejudice in light of the interests protected by the right to a speedy appeal: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be

impaired." *China*, 150 N.C. App. at 475, 564 S.E.2d at 69 (citation omitted). "Courts will not presume that a delay in prosecution has prejudiced the accused. The defendant has the burden of proving the fourth factor." *State v. Hughes*, 54 N.C. App. 117, 120, 282 S.E.2d 504, 506 (1981) (citations omitted).

¶ 46 Concerning the first two interests, Defendant asserts that his incarceration during the Covid-19 pandemic was "uniquely stressful and oppressive." Concerning the third interest, Defendant argues that the delay diminished his memory of the events and hindered his ability to correct mistakes in the transcript, thereby prejudicing his appeal.

¶ 47 Defendant's "[g]eneral allegations of faded memory are not sufficient to show prejudice resulting from delay[.]" *State v. Heath*, 77 N.C. App. 264, 269, 335 S.E.2d 350, 353 (1985), *rev'd on other grounds*, 316 N.C. 337, 341 S.E.2d 565 (1986). Defendant has failed to show that evidence lost by delay was significant and would have been beneficial. *See State v. Jones*, 98 N.C. App. 342, 344, 391 S.E.2d 52, 54-55 (1990) ("[T]he test for prejudice is whether significant evidence or testimony that would have been helpful to the defense was lost due to delay[.]"). Further, "the transcript eventually prepared and made available to the parties was adequate to allow full development of appeal issues." *Hammonds*, 141 N.C. App. at 165, 541 S.E.2d at 176. Acknowledging Defendant's allegation of stress caused by incarceration during the pandemic, Defendant has failed to show prejudice resulting from the delay.

¶ 48 After balancing the four factors set out above, we hold that the delay in processing Defendant's appeal did not rise to the level of a due process violation.

III. Conclusion

¶ 49 The trial court did not err or plainly err in its instruction on constructive possession, and did not plainly err in its instruction on attempted first-degree murder. Further, Defendant's Constitutional due process rights were not violated by the court reporter's delay in producing the trial transcript.

NO ERROR; NO PLAIN ERROR.

Chief Judge STROUD and Judge DIETZ concur.

STATE v. SANDER

[280 N.C. App. 115, 2021-NCCOA-566]

STATE OF NORTH CAROLINA
v.
JON FREDERICK SANDER, DEFENDANT

No. COA20-475

Filed 19 October 2021

1. Constitutional Law—due process—competency to stand trial —sua sponte competency hearing

Due process did not require the trial court to conduct a sua sponte competency hearing in defendant's trial for first-degree murder where defendant had already undergone two pre-trial competency evaluations that found him competent to stand trial and his erratic actions at trial were all either: the same types of conduct that had already been considered in the previous competency evaluations, merely indicative of an unwillingness to work with his attorneys, suggestive of performance exaggeration, or demonstrative of an understanding of the proceedings against him.

2. Constitutional Law—effective assistance of counsel—claim prematurely asserted on direct appeal—dismissal without prejudice

Defendant's argument that he received ineffective assistance of counsel during his first-degree murder trial was dismissed without prejudice to his ability to file a motion for appropriate relief in the trial court, where the record on appeal did not clearly disclose an impasse between defendant and his trial counsel.

Appeal by Defendant from judgments entered 15 April 2019 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 25 August 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant Jon Frederick Sander ("Defendant") appeals from several judgments imposing consecutive life sentences for three counts of

first-degree murder. On appeal, Defendant contends that the trial court erred in failing to *sua sponte*: (1) order a third competency evaluation for Defendant; and (2) declare an impasse between Defendant and his trial counsel over jury selection disagreements. After careful review, we hold Defendant has failed to demonstrate error under his first argument. We dismiss Defendant's second argument, without prejudice to his filing a motion for appropriate relief in the trial court, because the record below does not definitively establish the impasse alleged.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 The record below tends to show the following:

1. Defendant's History of Mental Illness

¶ 3 Defendant has a long history of mental illness. He was treated in 2008 in Pennsylvania for anxiety, depression, and insomnia. According to his family and longtime girlfriend, Defendant exhibited aspects of paranoia, including building safe rooms wherever he lived, changing the locks whenever he moved into a new home, and developing "escape plans" should he and his family come under some kind of imminent threat.

¶ 4 In 2011, Defendant was involuntarily committed in Pennsylvania for suicidal thoughts and agitation stemming from a dispute with an ex-employee. Medical records from the commitment proceeding indicated symptoms of delusions/paranoia. They also included notes that he was a "semi-reliable historian" and admitted to "acting delusional and overplay[ing] the issues" related to the ex-employee. After converting the commitment proceeding from involuntary to voluntary, Defendant was diagnosed with bipolar disorder, treated with medication, and discharged with signs of significant improvement.

¶ 5 In 2013, Defendant voluntarily sought psychiatric care again and was diagnosed by a psychologist with ADHD, bipolar I disorder, generalized anxiety, and panic disorder.

¶ 6 In 2014, Defendant moved to North Carolina and began living next door to his business partner and close friend, Sandy Mazzella ("Sandy"). In 2014, Defendant saw his general practitioner who noted that he had stopped taking his medications for bipolar disorder because "it does not make him feel like himself." During a later visit to that same doctor, Defendant reported that "his bipolar disorder has been stable," his business with Sandy was thriving, and that he "knows that if he gets manic he needs to go to the hospital."

2. Facts Underlying Defendant's Murder Convictions

¶ 7 Defendant's business and social relationship with the Mazzella family began deteriorating the following year. Sandy accused Defendant of embezzling money from their business, leading Sandy and his father, Sal Mazzella ("Sal"), to try to expel Defendant from the enterprise. Sandy and Sal also took a restraining order out against Defendant following alleged threats against them.

¶ 8 On 19 March 2016, Sandy's fourteen-year-old daughter told her mother, Stephanie Mazzella ("Stephanie"), that Defendant had touched her inappropriately, leading the Mazzellas to file a police report against Defendant. A few days later, Defendant went to the Mazzella's home with a gun and shot Sandy, Stephanie, and Sal's wife, Elaine. All three victims died. Following a standoff with police at his home, Defendant was arrested for the murders.

3. Defendant's First Competency Evaluation

¶ 9 Defendant was taken into custody and placed under constant psychiatric observation in a hospital mental health unit. Per a forensic psychiatric evaluator, his observation records generally disclosed "no signs of mental health symptoms," with a few notable exceptions. Beginning on 17 May 2016, Defendant reported hearing "voices in his subconscious mind," though similar reports were determined not to be hallucinations but instead instances of Defendant recalling and replaying past events in his head. In July of 2016, he reported "auditory hallucinations of 'screaming.' " In February of 2017, he claimed evil spirits were bothering him; these reports continued over the course of that month and ceased on 24 February 2017. Some of these reports were noted by Defendant's treatment staff to be "malingering and manipulative." From May 2017 to August 2018, Defendant displayed no concerning symptoms beyond depression.

¶ 10 Defendant's counsel eventually moved for a competency determination. That motion was granted and, following two interviews and a forensic psychiatric evaluation, on 14 November 2018 Defendant was determined competent to proceed. The evaluator based this opinion on her observations that "Mr. Sander amply demonstrated that the beliefs, whether attributed to sincerity or impression management, did not interfere in his capacity-related abilities."

4. Defendant's Second Competency Evaluation

¶ 11 Following his evaluation and return to Wake County Detention Center, Defendant grew increasingly antagonistic toward his lead trial

counsel, accusing him of conspiring with Sal to frame Defendant. He informed his counsel that he had met with an imaginary correction officer about his case. Defendant said the correction officer stated the State's photographic evidence was doctored and assured Defendant he would ultimately be acquitted on that basis. Defendant also told his attorneys the correction officer was to appear in court on the first day of trial alongside three out-of-town lawyers to file a "class action" against those involved in the conspiracy to convict him of murder.

¶ 12 Defendant's counsel moved for a second evaluation based on the above statements, which the trial court granted on 8 January 2019. Defendant repeated the statements he had made to his trial counsel to the forensic interviewer, telling her that the correction officer would make a public show of proving Defendant's innocence and take down the "legacy" of his lead counsel for framing Defendant. Defendant also said that he believed he would not be found guilty based on his character and that he would accept and work with his attorneys if his predictions regarding the correction officer did not come true. The examiner concluded that Defendant "continues to make choices regarding his [re]presentation, which may very well be considered self-sabotaging and very poor judgment . . . . These choices are not, however, the result of a psychotic disorder or other loss of capacity for rational thought." The trial court subsequently ruled Defendant was competent to proceed based on the expert conclusions reached in the first and second competency evaluations.

5. Subsequent Pre-Trial Motions

¶ 13 In advance of trial, Defendant's counsel moved for a third competency hearing, though they conceded that they had "no further evidence to offer the court . . . other than our original [two] applications [for competency determinations]." The trial court denied the motion. Defendant's counsel then moved to have Defendant restrained in handcuffs and ankle restraints based on prior threats to his attorneys and a fear that he may try to steal and use a bailiff's firearm. The trial court denied that motion but ordered all courtroom deputies to unload their firearms.

6. Jury Selection Interruptions

¶ 14 All three murder charges were joined for trial and jury selection began on 25 February 2019. Defendant was disruptive at various points throughout. On the third day of jury selection, the trial court observed that Defendant "began sitting and acting in an aggressive manner" toward prospective jurors. In response to Defendant's conduct, the trial court excused the jury pool and ordered Defendant be placed in ankle

restraints, all while Defendant argued with the judge and threatened court personnel. Defendant continued his outburst and threw a notepad across the room, leading the trial court to order wrist restraints.

¶ 15 Later that same day, as Defendant's counsel was questioning a potential juror, Defendant expressed that the State's evidence was not credible. The trial court requested Defendant be quiet and Defendant momentarily complied. A few moments later, after a potential juror stated any extreme punishment had to match the crime, Defendant again interjected with a question designed to show that the State's evidence and theory of the crime was unbelievable. The prospective juror was excused from the courtroom, Defendant argued with the judge, asserted his innocence on the record, and ceased speaking. The prospective juror was returned to the courtroom and Defendant remained quiet for the remainder of the day.

¶ 16 Defendant's outbursts continued on the following day. During examination of one potential juror, Defendant interjected to correct a statement by the prosecutor that the Mazzellas owned their home; moments later, Defendant claimed in front of the prospective juror that the photographs of the crime scene were "staged." On both occasions, Defendant was gently admonished by the court before apologizing and ceasing his interruptions. A few questions later, Defendant engaged in a more prolonged outburst, claiming that one of the State's key witnesses would not be testifying because she was too afraid. He also laughed at his lead defense counsel, and said "your legacy, ha, ha, ha, ha, ha. . . . [Y]our legacy is over." Defendant then threatened others inside the courtroom and was removed ahead of the lunch recess. Before calling the recess, the trial court noted on the record that Defendant "almost seems that he is inviting [further restraints], but I don't know that I'm going to accept his invitation."

¶ 17 Defendant was silent over the next several days of jury selection. On the eighth day, however, Defendant told the trial judge at the outset of proceedings that he believed his counsel had violated their fiduciary duties in sending him a letter requesting guidance as to whether he planned to testify in his own defense. Defendant's concern stemmed from his counsel's understanding that Defendant was claiming the victims were already dead, when Defendant claimed he was asserting: (1) he shot and *wounded* the victims; and (2) Sal then executed the victims. Defendant further expressed that he did not trust his lead counsel, but that he did trust another of his attorneys. The trial court denied Defendant's motion to dismiss his counsel on the basis that they had not violated their duties in seeking guidance and input from him. Later during jury

selection, Defendant's counsel asked the court to extend the deadlines for the defense's mitigation experts' opinions so that they could consider Defendant's actions during jury selection and prior to his testifying at trial. The trial court agreed.

¶ 18 As his counsel predicted, Defendant was not finished interrupting *voir dire*. At one point, Defendant asked to speak to the court. After being told to discuss the matter with his counsel and taking a moment to talk with his attorneys, Defendant withdrew the request. Next, as his counsel was questioning another prospective juror, Defendant interjected to question whether it was likely a person would "sexually molest[] a 14-year-old-girl at . . . [a] Super Bowl party at my house with everybody," suggesting that no person would do such a thing in the presence of so many witnesses. Defendant then claimed that the minor had sexually propositioned him the night before, and it would not have made sense for him to decline that advance in private and then pursue it in the presence of others. The prospective juror was excused from the courtroom during this outburst, as was Defendant after threatening others in the courtroom. When Defendant returned, the trial court ordered he be placed in a restraining chair "for control of the courtroom, safety of his counsel and safety of others in the courtroom." Defendant later informed the court, "that will be my last outburst on the Super Bowl thing," prompting the trial court to release him from the restraining chair.

¶ 19 Defendant later objected to the prosecutor's statement to a potential juror that "evidence" of child molestation may be introduced during the trial; Defendant interjected to say that it was actually an "allegation" of molestation before sarcastically denigrating his counsel. That juror was excused from the courtroom, and Defendant lobbed a non-sequitur at the State, challenging the prosecutor's understanding of controlled substance laws.

¶ 20 Defendant was quiet throughout the remainder of jury selection.

7. Defendant's Conduct During the Guilt/Innocence Phase

¶ 21 Prior to opening statements, Defendant's counsel informed the court that they were unsure as to whether to present an opening statement because Defendant had given them no direction as to what witnesses to call, what evidence to present, and whether Defendant was going to testify. The trial court explained to Defendant that he had placed counsel in a difficult position and what consequences could follow, leading Defendant to state that he understood the situation and was "going to let [counsel] handle [his defense]." Following a recess so that Defendant

could discuss the matter with his counsel, the State and Defendant's counsel both gave opening statements.

¶ 22 Defendant's counsel's opening stressed that the Mazzellas were putting economic pressures on Defendant in their attempts to divest him from the business and had taken legal action against Defendant through applications for protective orders. Defendant's counsel closed by telling the jury Defendant "denies that he killed those three people in that house. He denies that he committed first-degree murder in that house. And you'll hear his testimony as to what occurred in the house."

¶ 23 Defendant's next interjection came during Sal's testimony. Sal, who was in the Mazzella home at the time of the shooting, testified that he was standing in the kitchen when he heard gunshots; he then told everybody in his family to take cover and went into the dining room to find a weapon. When he returned, he saw Defendant shoot his wife after entering the house through the laundry room. Sandy then told Sal to run, so he ran into the woods near the house. Defendant interrupted this testimony, expressing that Sal was not credible. Defendant was removed from the courtroom and the jury was instructed to disregard the outburst and the fact that Defendant was in wrist and ankle restraints.

¶ 24 Defendant was quiet during the remainder of the State's case-in-chief. After the State rested, Defendant told the trial court that he did not wish to testify because "[t]he truth will come out." Defendant's wife then testified in his defense, as did a digital forensic examiner. After Defendant was found guilty on all three counts of first-degree murder, he told the court to "[p]ut me to death, that's what's happening anyway. I was framed. . . . That's the way it is. And justice will be served."

8. Sentencing Phase

¶ 25 Defendant introduced testimony from several mitigation experts in the sentencing phase of the hearing. His first expert acknowledged Defendant had a history of malingering, but testified she was ultimately unable to confirm he was exaggerating symptoms. His second expert was less circumspect, testifying that while Defendant was bipolar, he was also falsely magnifying his symptoms. Defendant's third expert, a prison warden who had reviewed Defendant's "demeanor and behavior during judicial proceedings," testified that Defendant's conduct in the courtroom was "disrespectful, threatening and created unwarranted discord," and that it was "highly unusual" for Defendant to have a completely clean disciplinary record over the three years he spent incarcerated pending trial.

¶ 26 The jury unanimously recommended a punishment of life imprisonment without parole, and on 15 April 2019 the trial court entered three judgments to that effect. The trial court adjourned at the conclusion of sentencing, but immediately resumed proceedings seconds later. Once back on the record, the trial court stated that "I'm going to note the defendant's appeal and I'm going to appoint the appellate defender as his counsel." Once Defendant's appeal was noted on the record, the trial court adjourned *sine die*.

¶ 27 Defendant's counsel filed a written notice of appeal later that day; the notice, however, included a file number for only one of Defendant's convictions and incorrectly identified the Supreme Court of North Carolina as the court to which the appeal was taken. Defendant's appellate counsel later filed a petition for writ of certiorari to review the judgments omitted from the written notice in the event Defendant's trial counsel failed to adequately perfect appeals from those convictions.

II. ANALYSIS

¶ 28 Defendant contends the trial court erred in failing to: (1) *sua sponte* order a competency hearing based on Defendant's conduct during jury selection and trial; and (2) declare an impasse over Defendant's disagreement with counsel over jury strikes. We first address Defendant's notices of appeal and his petition for writ of certiorari before proceeding to the merits of his appeal.

1. Appellate Jurisdiction

¶ 29 Defendant seeks a writ of certiorari to review the judgments below in the event the notices of appeal in the record failed to comply with Rule 4 of the North Carolina Rules of Appellate Procedure. The State acknowledges that the trial court noted an appeal by Defendant at the conclusion of the sentencing hearing and further concedes that a writ of certiorari is appropriately within our discretion under the circumstances presented. Assuming *arguendo* that the Defendant has failed to perfect his appeal pursuant to Rule 4(a) of the North Carolina Rules of Appellate Procedure, we grant Defendant's petition in our discretion to review all three of his convictions.[1]

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1. Neither Defendant nor the State addresses the defect in the written notice of appeal filed by trial counsel identifying the Supreme Court, rather than this Court, as the court to which Defendant's appeal was taken. *See* N.C. R. App. P. 4(a)(2), (b), & (d) (2021) (providing that written notices of appeal must designate the Court of Appeals as the court to which appeal is taken in criminal cases where the death penalty has not been imposed). This oversight extends to Defendant's petition for writ of certiorari, which explicitly requests certiorari review of only the two file numbers not included in the defective written

2. Defendant's Competency

¶ 30 **[1]** Defendant asserts that his constitutional right to due process was violated by the trial court's failure to *sua sponte* conduct a competency hearing based on his erratic conduct in court. *See, e.g.*, *State v. Sides*, 376 N.C. 449, 458, 852 S.E.2d 170, 176 (2020) (recognizing a criminal defendant's constitutional due process right to a *sua sponte* competency hearing). A defendant "is competent to stand trial if 'he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him.' " *Id.* (quoting *Ryan v. Gonzales*, 568 U.S. 57, 66, 184 L. Ed. 2d 528, 539 (2013)). The duty to conduct a *sua sponte* competency hearing is triggered when there is "sufficient doubt of [a defendant's] competence to stand trial," *Drope v. Missouri*, 420 U.S. 162, 180, 43 L. Ed. 2d 103, 118 (1975), based upon "substantial evidence before the court indicating that the accused may be mentally incompetent." *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977).

¶ 31 There is no bright-line rule establishing when a *sua sponte* competency hearing is required, as "whether substantial evidence of a defendant's lack of capacity exists . . . requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case . . . [and a] consideration of all the evidence in the record when viewed in its totality." *Sides*, 376 N.C. at 466, 852 S.E.2d at 181-82. Circumstances pertinent to this analysis include "a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Drope*, 420 U.S. at 180, 43 L. Ed. 2d at 118. Severe mental illness, while relevant, is not dispositive. *See Indiana v. Edwards*, 554 U.S. 164, 178, 171 L. Ed. 2d 345, 357 (2008) (noting a defendant may suffer from severe mental illness and still be competent to stand trial); *cf. State v. Chukwu*, 230 N.C. App. 553, 562, 749 S.E.2d 910, 917 ("A defendant need not 'be at the highest stage of mental alertness to be competent to be tried.' " (quoting *State v. Shytle*, 323 N.C. 684, 689, 374 S.E.2d 573, 575 (1989)). Other relevant factors include, but are not limited to, whether the defendant's actions are: (1) a continuation of previously evaluated symptoms, *State v. Coley*, 193 N.C. App. 458, 461, 668 S.E.2d 46, 49 (2008); (2) indicative of malingering, *Chukwu*, 230 N.C. App. at 563, 749 S.E.2d at 917; (3) the result of an unwillingness to work with attorneys rather

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notice of appeal. However, because neither party contests certiorari review of these judgments, the State has not sought to dismiss Defendant's appeal, all three first-degree murder charges were tried jointly, and Defendant's petition further requests that this Court "grant any other relief that it deems proper," in our discretion we allow Defendant's petition to review all three convictions.

than an inability to do so, *id.*; and (4) demonstrative of an understanding of the proceedings, *State v. Badgett*, 361 N.C. 234, 260, 644 S.E.2d 206, 221 (2007).

¶ 32 Defendant points to the following evidence as sufficient to raise a doubt as to his competency: (1) Defendant had a documented history of mental illness; (2) Defendant was not engaging with his attorneys and spoke of "spirits" during pre-trial preparations; (3) Defendant threatened his attorneys, requiring the trial court to shackle him; and (4) Defendant irrationally failed to contribute to his defense while facing potential capital punishment. We hold that these assertions do not constitute substantial evidence under the totality of the circumstances drawn from the complete record.

¶ 33 Defendant underwent two competency evaluations. Both determined that he was competent to stand trial notwithstanding his mental health diagnoses. Those prior diagnoses—already addressed in earlier competency evaluations—do not suggest incapacity at trial warranting a *sua sponte* competency hearing. S*tate v. Allen*, 377 N.C. 169, 2021-NCSC-38, ¶ 29 ("[T]he fact that a defendant has received mental health treatment in the past . . . does not, without more, suffice to require the trial court to undertake an inquiry into the defendant's competence on the trial court's own motion."); *Coley*, 193 N.C. App. at 464, 668 S.E.2d at 51 (holding no *sua sponte* competency hearing was required because the irrational behavior at issue was addressed in a prior evaluation deeming the defendant competent).

¶ 34 Defendant's lack of engagement with his attorneys, his threats towards them, and his belief that his attorneys were conspiring with Sal to frame him likewise do not suggest a lack of competency in light of previous evaluations. In fact, the second competency evaluation was conducted to evaluate these exact issues. The forensic evaluator nonetheless deemed Defendant competent following that examination, stating Defendant:

> has expressed an unwillingness to work cooperatively with his lawyer . . . . This evaluation does not find, though, that [Defendant] lacks *capacity* or *ability* to work with his lawyer in a reasonable and rational manner, should he choose to do so. . . . [Defendant] continues to make [poor] choices regarding his [rep] resentation . . . . These choices are not, however, the result of a psychotic disorder or other loss of capacity for rational thought.

In other words, Defendant's refusal to work with his counsel at trial, his belief he was being framed by them, and his aggression in the courtroom was not new conduct. Instead, these behaviors were the subject of a previous evaluation that determined him competent. As such, these facts do not suggest a change in competency warranting a *sua sponte* hearing under our caselaw. *See Chukwu*, 230 N.C. App. at 563, 749 S.E.2d at 917-18 (holding no *sua sponte* hearing required where the pre-trial competency evaluation deemed the defendant competent despite the defendant's belief that his attorney was working against him); *Coley*, 193 N.C. App. at 464, 668 S.E.2d at 51.

¶ 35 Defendant relies heavily on *State v. Whitted*, 209 N.C. App. 522, 705 S.E.2d 787 (2011), to argue that a *sua sponte* hearing was required. In that case, the defendant had not undergone a competency evaluation prior to trial. *See generally id.* On the third day of trial, the defendant refused to participate, stating that she would rely on her faith instead. *Id.* at 528, 705 S.E.2d at 791. The defendant was then "brought forcibly into court, handcuffed to a rolling chair after having been tasered, [and began] chant[ing] loudly and s[inging] prayers and religious imprecations." *Id.* at 528, 705 S.E.2d at 791-92. The defendant also confessed her guilt, asserted she did not care about a life sentence, and claimed her attorney was working for the State. *Id.* On appeal, we held that the trial court erred in failing to *sua sponte* order a competency evaluation based on the defendant's in-court conduct. *Id.*

¶ 36 *Whitted* is materially distinguishable. Most critically, in this case Defendant underwent two competency evaluations that focused on the same conduct that later arose at trial. So while Defendant had previously claimed that he spoke to spirits and believed his counsel was trying to frame him, both of those assertions—in a marked departure from *Whitted*—had already been deemed not indicative of incompetency at the time of trial. Further, unlike in *Whitted*, Defendant's outbursts showed an intention to challenge the State's case against him based on a cognizable—however strange—theory that Defendant only wounded the victims and Sal was ultimately responsible for killing them. These contentions by Defendant were considered in the prior evaluations deeming him competent, and thus did not trigger a requirement to conduct a new competency hearing *sua sponte*. *See Chukwu*, 230 N.C. App. at 564-65, 749 S.E.2d at 918 (holding the defendant's consistent assertion that he was a Nigerian diplomat was not indicative of incompetency requiring *sua sponte* evaluation when a prior evaluation considered this assertion and nonetheless determined the defendant was competent).

¶ 37 Given that Defendant's conduct at trial was largely the same as that examined in the prior competency evaluations finding him competent,[2] his disruptive conduct does not suggest an inability to stand trial. *Id.*; *Coley*, 193 N.C. App. at 464, 668 S.E.2d at 51. The remaining circumstances in the record likewise do not suffice to demonstrate potential incompetency. Defendant's own expert acknowledged Defendant's history of malingering and exaggeration of symptoms for show, an observation echoed by the trial court's own impressions of Defendant. *See Chukwu*, 230 N.C. App. at 563, 749 S.E.2d at 917 (malingering weighed against suggestion of incompetency). Defendant's conduct in the courtroom also stands in contrast to his out-of-court behavior, further suggesting his actions took on a performative aspect. *See id.* at 567, 749 S.E.2d at 920 (noting the contrast between in-court and out-of-court behavior suggested the defendant was competent). Lastly, Defendant's outbursts, though combative, inappropriate, and at times violent, do show an intent to deny the charges and an implicit understanding of the State's theory of the case and the probative value of the evidence arrayed against him. For example, Defendant interrupted jury selection on several occasions to assert his innocence or question—however untimely or unconvincingly—the believability of some of the State's evidence, demonstrating an understanding of proof, probative value, credibility, reliability, and other concepts important to his defense. The nature of these interjections militates against a determination that substantial evidence warranted a third *sua sponte* competency determination. *See Badgett*, 361 N.C. at 260, 644 S.E.2d at 221 (holding no substantial evidence of potential incompetency in part because the defendant "conferred with [his counsel] on issues of law applicable to his case" and "demonstrated a strong understanding of the proceedings against him").

¶ 38 In sum, Defendant's conduct at trial did not amount to substantial evidence requiring the trial court to *sua sponte* conduct a competency hearing in the face of two prior evaluations concluding he was competent. His actions were all either: (1) the subject of a prior evaluation deeming him competent to stand trial; (2) indicative of an unwillingness—rather

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2. Defendant's assertion in his reply brief that his trial conduct was new and markedly different is simply not borne out by the record. All of Defendant's outbursts and threats to others related to: (1) his belief his counsel was conspiring with Sal to frame him; (2) his belief that Sal was the actual murderer; (3) his claim that photographic evidence of the crime scene had been doctored; and (4) his belief that the conspiracy against him would be revealed, he would be acquitted, and his counsel's "legacy" would be destroyed. These were all addressed in the second competency evaluation deeming Defendant competent to undergo trial.

than inability—to work with counsel; (3) suggestive of malingering and performative exaggeration; or (4) demonstrative of an understanding of the evidence, charges, and proceeding against him. We therefore hold, under the totality of the circumstances, that Defendant has not shown error in this regard.

3. Alleged Impasse and Ineffective Assistance of Counsel

¶ 39 **[2]** In his final argument, Defendant claims he reached an impasse with trial counsel over the use of jury strikes and was thus denied effective assistance of counsel. Defendant cites to the following exchange in the record for support:

> MR. SANDER: I just want to let you know that I don't think my team here is going to be picking jurors. We went through a bunch of them yesterday that were great. I just want to let you know that's my feeling. We had 22 pretty good people. We'll see what happens today, I guess.
>
> THE COURT: All right. If you want to consult with your attorneys about the selection—I know I've seen them—when they find someone acceptable, they consult with you, but if you would like to consult with them more, you're more than welcome.
>
> MR. SANDER: Yeah, I talked to [defense counsel] . . . yesterday. He asked me about a few of them that I said were good and they were dismissed.

¶ 40 Defendant's discussion with the trial court does not definitively reveal an impasse, as it could conceivably suggest an intention of Defendant to continue to work with his attorneys during jury selection despite his apparent disagreement with some of their strikes. We note Defendant did not raise the issue again in jury selection, during trial, or at sentencing, further suggesting no unresolvable impasse arose. Our Supreme Court has held that, where the record does not clearly disclose an impasse between a defendant and his trial counsel, the appropriate disposition is to dismiss the appeal without prejudice to filing a motion for appropriate relief with the trial court. *State v. Floyd*, 369 N.C. 329, 341, 794 S.E.2d 460, 468 (2016). Consistent with *Floyd*, we dismiss this portion of Defendant's appeal without prejudice to his right to file such a motion with the trial court on this ground.

III. CONCLUSION

¶ 41 For the foregoing reasons, we hold Defendant has not shown error in the trial court's failure to conduct a *sua sponte* competency hearing based on Defendant's conduct at trial. We dismiss his remaining argument without prejudice to raising that issue by a motion for appropriate relief.

PETITION FOR WRIT OF CERTIORARI GRANTED; NO ERROR IN PART; DISMISSED IN PART.

Judges WOOD and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 OCTOBER 2021)

LOWREY v. CHOICE HOTELS INT'L, INC. 2021-NCCOA-438 No. 20-782	Durham (19CVS3400)	VACATED AND REMANDED WITH INSTRUCTIONS
IN RE A.G. 2021-NCCOA-567 No. 21-96	Mecklenburg (19JA308)	Affirmed
IN RE A.T. 2021-NCCOA-568 No. 21-216	Bladen (20JA7)	Vacated and Remanded
IN RE V.W. 2021-NCCOA-569 No. 21-174	Mecklenburg (19JA287)	Affirmed
IN RE X.D.P-S. 2021-NCCOA-570 No. 21-109	Yadkin (18JA66)	Vacated and Remanded
JACOBS v. DUDLEY 2021-NCCOA-571 No. 21-120	Mecklenburg (19CVD12030)	Vacated and Remanded
McKINNEY v. ESHLEMAN 2021-NCCOA-572 No. 20-825	Forsyth (18CVS5258)	Affirmed
PROVIDENT LIFE & ACCIDENT INS. CO. v. BROWN 2021-NCCOA-573 No. 20-897	Mecklenburg (19CVS20436)	Affirmed
STATE v. AMERSON 2021-NCCOA-574 No. 20-836	Lee (14CRS50705)	No Prejudicial Error.
STATE v. BEST 2021-NCCOA-575 No. 20-614	Durham (13CRS59913) (16CRS2178-79)	No Error
STATE v. FARRIOR 2021-NCCOA-576 No. 20-513	Forsyth (17CRS59311)	Vacated

STATE v. GREEN 2021-NCCOA-577 No. 20-521	Surry (19CRS293) (19CRS51128-29)	No Error
STATE v. HALE 2021-NCCOA-578 No. 20-716	Mecklenburg (17CRS214592) (17CRS214595)	No Prejudicial Error
STATE v. INMAN 2021-NCCOA-579 No. 20-666	Guilford (18CRS87054-59)	No Error
STATE v. REED 2021-NCCOA-580 No. 20-906	Columbus (18CRS51956)	Vacated and Remanded
STATE v. RIGGS 2021-NCCOA-581 No. 21-71	Carteret (19CRS51820-22)	No Error

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